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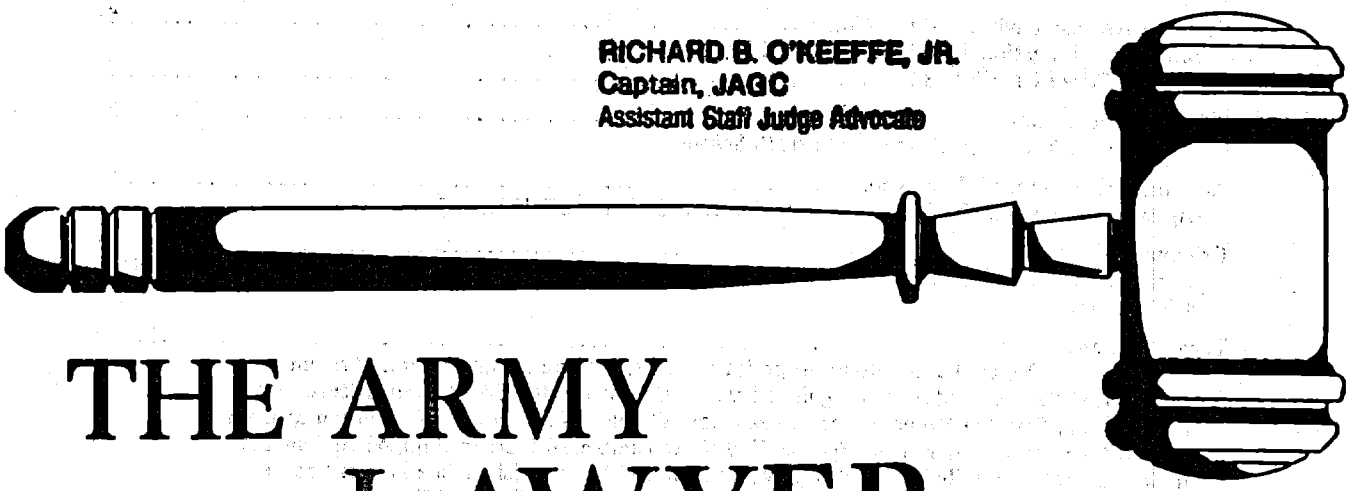

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Crime in the Home

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Introduction

This article addresses the one aspect of the Army Family Advocacy Program[1] that causes the most friction between Army lawyers and family advocacy staff[2] in handling the problems of spouse and child abuse[3] in military communities across the Army: The prosecution of soldiers who are accused of crime in the home[4]—that is, abuse-related crimes committed by soldiers against members of their families. The friction that arises in many of these cases is purely a matter of professional perspective. What a social worker might view as a manifestation of family dysfunctioning in need of treatment is often viewed by a lawyer as a crime warranting prosecution and punishment.

Not all instances of spouse or child abuse, as defined, involve criminal acts, and fortunately, most of the abuse that does occur, even when criminal in nature, does not constitute serious crime, as this article will demonstrate. Nevertheless, the number of court-martial cases involving crime in the home is enough to cause discord between lawyers and family advocacy staff on some Army installations.

Sometimes those feelings have become strong enough that members of Congress have gotten involved in the fray. At the Department of Army level, the professional differences that arise at the installation level frequently surface in the form of requests for changes in the law or in regulatory guidance. This article addresses one such proposal, Issue 14 of the Army Family Action Plan, that suggests that there is a need to protect the so-called "retirement benefits" of family members when soldiers are tried, convicted, and punished by court-martial for crime in the home. After examining the available statistical data and existing regulatory guidance, the article concludes that Issue 14 is a "phantom issue" and there is no need to change our present policy.

Only those abuse-related crimes committed by soldiers against members of their families are within the purview of this article. Assaults and sexual offenses committed by soldiers against children not related to them by blood or marriage are generally outside the scope of the Army Family Advocacy Program and will not be addressed.[5]

The Army Family Advocacy Program

The Army Child Advocacy Program was established in 1975. Initially, the program was conceived as a medical program directed only at the treatment of child abuse. Later, the program was broadened to address the social aspects of this problem as well. In 1977, the program was placed under the general responsibility of Army Community Service.[6] In 1981, the program was expanded to address the

[1] The objectives of this program are listed in Dep't of Army, Reg. No. 608-18, Personal Affairs—The Army Family Advocacy Program, para. 1-5 (18 Sept. 1987) [hereinafter AR 608-18].

[2] The reference to family advocacy staff throughout this article is intended to include all social workers, nurses, dentists, psychologists, psychiatrists, and other medical personnel who treat the perpetrators and victims of spouse or child abuse.

[3] AR 608-18, glossary section II, defines these terms as follows:

Spouse Abuse

An assault, a battery, a threat to injure or kill, any other unlawful act of force or violence, or emotional maltreatment inflicted by one spouse in a marriage against the other when the victim, regardless of age, is authorized treatment in a medical facility of the Military Services. Emotional maltreatment is conduct which, although not criminal, is so offensive to the victimized spouse that a reasonable person would find such conduct abhorrent within a marital relationship.

Child Abuse

Except as otherwise indicated in this regulation, child abuse includes child sexual abuse and child neglect, and means the physical injury, sexual maltreatment, deprivation of necessities, or other maltreatment of a child by a parent, guardian, or any other person (including an employee of a residential facility or any staff person providing out-of-home care) who is responsible for the child's welfare on a temporary or permanent basis.

As defined, both spouse and child abuse include conduct that is criminal as well as noncriminal in nature. It should be noted that with regard to criminal acts of child abuse, family advocacy staff should not be advising commanders on the disposition of crimes other than those committed by a soldier against his or her child, step-child, or other minor military dependant living within the home. Commanders are cautioned to consider the recommendations of the Family Advocacy Case Management Team before taking or recommending disciplinary and administrative actions against soldiers only in cases of abuse occurring within the family. The FACMT would not make a recommendation on the disposition of a case involving a soldier who has assaulted a child unrelated to the soldier, even if such child was under the care of the soldier at the time of the assault. *See* AR 608-18, para. 4-1.

[4] The term "crime in the home" is used throughout this article to describe abuse-related crimes committed by soldiers against their spouses and children that involve such offenses as assault, battery, and threats to injure or kill. Also included are all sexual offenses committed by soldiers against their children, such as rape, carnal knowledge, and indecent assault. A complete listing of these offenses is at *infra* note 27. Almost all such criminal acts between members of the family occur in the home. For this reason, "crime in the home" is used synonymously with abuse-related crimes throughout this article. A few decades ago, the barrier posed by the walls of a home were enough to remove all but the most serious abuse-related crimes from public scrutiny and criminal prosecution. Those who suggest that those walls should be completely ignored today are just as wrong, in the author's opinion, as are those who suggest that they make a crucial difference in deciding how these crimes should be handled.

[5] As those familiar with court-martial practice know, the number of court-martial cases involving child sexual offenders has increased dramatically over the past several years. In 1974, only one inmate of the United States Disciplinary Barracks (USDB), Fort Leavenworth, Kansas, was incarcerated for a child sexual offense. As many as 85 such offenders were incarcerated during a one-week period in 1985. As of 17 December 1987, 255 inmates (18% of the prison population) were child sexual offenders. Approximately 35% of these offenders assaulted children outside their families (*i.e.*, not related to them by blood or marriage). Not all of these offenders are soldiers because the USDB incarcerates military prisoners from the U.S. Air Force and the U.S. Marine Corps, as well as from the U.S. Army. Letter from Lieutenant Colonel (LTC) Ray V. Smith, MS, Director of Mental Health, USDB, to LTC Jim Schlie, Military Family Resource Center, Arlington, Virginia (Dec. 29, 1987). For a general discussion of the prosecution of sexual abuse cases, see Andrews, *The Child Sexual Abuse Case*, Parts I & II, The Army Lawyer, Nov. 1987, at 45 and Dec. 1987, at 33.

[6] Dep't of Army, Reg. 608-1, Personal Affairs—Army Community Service (1 Oct. 1978).

problem of spouse abuse and was redesignated the Army Family Advocacy Program.[7]

The Army Family Advocacy Program is designed to prevent child and spouse abuse by providing services that improve family functioning and reduce the kinds of stress that can trigger abuse.[8] Family advocacy staff try to identify abuse in families as early as possible so that treatment services can be provided. The full scope of the program addresses the prevention, identification, reporting, investigation, and treatment of spouse and child abuse throughout the Army.[9] Family advocacy treatment and counselling services are available to all soldiers and their families, as well as all others who are eligible for care in military treatment facilities.[10]

Army lawyers are involved on a day-to-day basis with advising family advocacy personnel on a wide variety of legal issues concerning such matters as jurisdiction (civil and criminal), the release of information from records, and the application of various laws and regulations to the program.[11] Lawyers and family advocacy staff are common allies in taking the necessary, legally-supportable actions that will protect victims of abuse, particularly children, from further harm or injury.

The professional differences between military lawyers and family advocacy staff, when they arise, usually concern not the protection of victims, but rather the handling of soldiers whose abusive acts constitute serious violations of the Uniform Code of Military Justice.[12] While military trial counsel view such abuse in the context of potential court-martial charges,[13] family advocacy staff generally consider prosecution and punishment in many such cases to be counterproductive to the treatment of abusers and the well-being of their families.[14]

AR 608–18 properly takes the middle ground by indicating that treatment of an abuser does not preclude disciplinary action in appropriate cases.[15] It is up to the commander of the accused soldier to decide on whether a particular report of an abuse-related crime is supported by the available evidence, and, if so, whether the offense warrants prosecution or another disposition.[16] Family Advocacy staff and trial counsel can be expected to do their best to persuade the commander on the best course of action to follow from their own professional viewpoints. In some cases, they will agree in the advice they give to the commander, and in others they will disagree. Nevertheless, in most cases justice will prevail, and the family will also receive the necessary medical and social services to cope with the abuse that has occurred and to prevent it from reoccurring. Those who would like to see a uniform disposition of all such cases are properly doomed to frustration and disappointment.

Issue 14 of the Army Family Action Plan

At the Department of Army level, those who seek to advance the interests of Army families in spouse and child abuse cases, as well as in all other areas of military life, have a forum in the annual Army Family Action Plan Planning Conference. Each conference, which is attended by command and family representatives from all the major Army commands, produces an Army Family Action Plan[17] for the coming year. The conference meets each year to evaluate the progress and impact of issues previously raised

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[7] The expansion and redesignation of the program occurred as a result of the publication of Dep't of Defense Directive No. 6400.1, Family Advocacy Program (May 19, 1981) (current version dated July 10, 1986). This directive required that each service create a program to address the prevention, evaluation, and treatment of spouse and child abuse. This directive was issued as a result of a May 1979 U.S. General Accounting Office study (U.S. General Accounting Office, *Report to Congress: Military Child Advocacy Programs—Victims of Neglect,* (1979)), as well as numerous conferences and studies that focused on the problem of domestic violence in the military. *See, e.g.,* J. Santos, *Domestic Violence in the Military Community* (Washington, D.C., Center for Women Policy Studies).

[8] Stress, such as that resulting from problems or long hours at work, financial difficulties, pregnancy, and household moves, is a leading cause of spouse and child abuse in the home. Stressful situations frequently arise in younger families. In the general population, the rate of spouse and child abuse for husband and wives under 31 years of age is more than twice that of those in the age group 31 through 50 years. M. Straus, R. Gelles, & S. Steinmetz, Behind Closed Doors—Violence in the American Family 129, 140–44, and 181–90 (1981). Seventy-three percent of Army soldiers are under the age of 31 years. Many of these young soldiers are married and have children. U.S. Dep't of Defense, Defense 87 Almanac 30, 33 (Sept.–Oct. 1987). Family Advocacy staff generally classify young families to be a "high risk" population insofar as the likelihood of spouse and child abuse is concerned. Nonetheless, the rate of child abuse generally is much lower in the Army than in the general population. During the period 1 October 1986 through 30 September 1987, the rate of child abuse was 10.2 children per 1,000 in the Army; the national rate during calendar year 1985 was 30.6 children per 1,000. No national statistics are available for spouse abuse.

[9] AR 608–18, para. 1–1.

[10] Dep't of Defense Directive No. 6400.1, Family Advocacy Program, para. B.3 (July 10, 1986). Accordingly, the program covers military active duty personnel and their dependents, and military retirees and their dependents. At military installations outside the United States, the program covers DOD civilian personnel and their families who receive treatment in military medical treatment facilities.

[11] AR 608–18, para. 1–7*j*.

[12] 10 U.S.C. §§ 801–940 (1982 & Supp. III 1985) [hereinafter UCMJ].

[13] Trial counsel will find support for this position in the Attorney General's Task Force on Family Violence, U.S. Dep't of Justice, Final Report 10 (Sept. 1984) [hereinafter Attorney General's Report], which recommends that family violence "be recognized and responded to as a criminal activity."

[14] Representative of this view, as articulated by a lawyer with regard to child abuse, is B. Caulfield, Child Abuse and the Law: A Legal Primer for Social Workers 8 (1979):

> When the law steps in—with talk of rights, statutes, and precedents—there has been a catastrophic failure of the human values that have far more force than any rule of law. . . . [T]he law is cold and formal, and such warmth as can come in the process issues only from the hearts of people.

And again at 12:

> An unsuccessful prosecution can result in further hazards to the child should the abuser choose to vent on the child his or her anger and frustration arising from the criminal charge. And successful prosecution can lead to the breakup of the family without concern for the impact this may have on the child, and whether other means, such as family treatment, might better meet the child's needs.

[15] AR 608–18, para. 3–29*b*.

[16] Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 306 and 307 [hereinafter R.C.M.]; *see infra* note 72.

[17] Dep't of Army, Pamphlet No. 608–41, Personal Affairs—The Army Family Action Plan IV (19 June 1987) [hereinafter DA Pam 608–41]. This pamphlet is part of the UPDATE system. Army family action plans have been published annually since 1984.

and to insert new issues in the Plan that identify the concerns of family members, determine the actions required to resolve those concerns, and task the appropriate Army agencies to come up with solutions.

Army Family Action Plan IV contains an issue[18] on crime in the home, which this article addresses, regarding the perceived need to protect the military retirement benefits of family members who are victims of such crime. Specifically, the issue provides as follows:

> e. Issue 14. Family Member Retirement Benefits Protection.
>
> (1) *Issue.* Family members lose entitlement to retirement benefits when punitive discharges occur[19] because of child/spouse abuse.
>
> (2) *Required Action.*
>
> (a) DACF-FSA[20] will coordinate with DACF-FSR[21] to—
>
> 1. Research and provide best method to rectify situation.
>
> 2. Research and propose corrective legislation as required.
>
> 3. Prepare approved legislative proposal.
>
> (b) DACF-FSA will revise policy if legislation is approved.
>
> (c) DAJA-ZA[22] will explore feasibility of developing guidance for JAGs[23] and Commanders[24] who sentence soldiers involved in child/spouse abuse. Guidance should address the whole family situation and family cooperation in the conviction.
>
> (3) *Lead agency.* DACF-FSA
>
> (4) *Support agencies.* DAPE-HRP-C,[25] DAJA-ZA, and DACF-FSR.

This issue appears to be premised on the following tentative conclusions:

1. Soldiers are being tried by court-martial for crimes involving both spouse and child abuse.
2. Soldiers who are convicted by court-martial for these crimes are eligible for military retirement benefits and are losing their military retirement benefits because they are being sentenced to punitive discharges.
3. Family members—both spouses and children—have, or should have, entitlements to these lost military retirement benefits.
4. These entitlements would not be lost if judge advocates, and the commanders they advise, properly considered the degree of family cooperation involved in obtaining convictions in these cases, and were better educated as to the effect punitive discharges have on the families of these soldiers.
5. There is a problem, and it is capable of being solved with legislation.

These tentative conclusions are often accepted as fact by many who view the military justice system to be a hindrance in assisting Army families who are affected by problems of spouse and child abuse. A corollary of Issue 14 is the often-repeated assertion by some social workers that family members of soldiers who are convicted by court-martial for crime in the home are "victimized twice"—that is, once by the soldier-spouse or soldier-parent who abuses them, and then again by the military justice system which, by punishing the soldier, indirectly punishes them as well by taking away their livelihood, military benefits, and whatever future prospect they have to financially benefit from the soldier's military retired pay.

A victim, of course, is a person against whom a crime is committed. Bringing criminals to justice does not produce additional victims. Family members who are dependent on the financial support of a criminal who has been brought to justice for a serious crime are usually going to suffer a loss of that support regardless of whether the crime was committed against them or someone outside the home. This is no more true in the military than in civilian society.

Record Systems Used

The best way to examine the tentative conclusions upon which Issue 14 is based is to look at the facts. The facts bearing on Issue 14 are contained in records maintained by

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[18] *Id.* para. 3-4*e*.

[19] Accordingly, the statistical study upon which most of this article is based did not address cases in which soldiers have been administratively discharged from the Army for crime in the home (unless such discharges occurred following arraignment on court-martial charges). As with court-martial cases, statistics are not maintained for administrative discharges that arise from spouse and child abuse. It would be impossible to obtain this data without conducting an Army-wide survey of all installation staff judge advocate offices for a given period of time. It is reasonable to assume, however, that the statistics for administrative discharges arising from spouse and child abuse would not differ significantly from those revealed by this article for court-martial cases involving abuse-related crime. For example, few, if any soldiers would likely request or receive an administrative discharge in lieu of trial by court-martial who were near or past the time when they would be eligible for military retirement except for the most serious of offenses. But even in those rare cases, a court-martial trial rather than an administrative discharge would be the likely disposition. As with other offenses, administrative discharges for crimes in the home would likely be issued only in cases where soldiers were many years away from eligibility for military retirement. *See generally* Dep't of Army, Reg. No. 635-100, Personnel Separations—Officer Personnel (19 Feb. 1969) (C27, 1 Aug. 1982) [hereinafter AR 635-100]; Dep't of Army, Reg. No. 635-120, Personnel Separations—Officer Resignations and Discharges (8 Apr. 1968) (C16, 1 Aug. 1982); Dep't of Army, Reg. No. 635-200, Personnel Separations—Enlisted Personnel (5 July 1984) [hereinafter AR 635-200]; AR 601-280, Personnel Procurement—Total Army Reenlistment Program (5 July 1984) [hereinafter AR 601-280].

[20] This office symbol refers to the Army Community Service (ACS) Branch of the Family Support Directorate of the U.S. Army Community and Family Support Center (USACFSC), which is a field operating agency (FOA) of the Office of the Deputy Chief of Staff for Personnel (ODCSPER). ACS has responsibility for overseeing funding and resource management in the Family Advocacy Program on Army installations. *See* AR 608-18, para. 1-7*d*(2).

[21] The Reserve Affairs Branch of the Family Support Directorate, USACFSC.

[22] The Judge Advocate General.

[23] This presumably refers to judge advocate officers serving in the capacity of military judges, although the drafters of this issue may also have intended to include all judge advocate officers who advise commanders on the disposition of court-martial charges.

[24] Commanders, of course, do not "sentence" soldiers. They do punish soldiers during nonjudicial punishment proceedings conducted pursuant to UCMJ art. 15, but, because this issue deals with retirement benefits and punitive discharges, that is probably not the context in which the word "commanders" is used here. Rather, it would appear that the drafters of this issue probably intended to include all detailed court-martial members who sentence soldiers, as well as all commanders, including court-martial convening authorities, who act or make recommendations on the disposition of court-martial charges.

[25] Soldier and Family Policy Division of ODSCPER.

The Judge Advocate General and The Surgeon General. The former, through the Records and Review Branch, Office of Clerk of Court, U.S. Army Legal Services Agency, maintains a system of records containing data on all general and special court-martial cases in the Army.

The Army Central Registry, which is maintained by The Surgeon General through the U.S. Army Patient Administration Systems and Biostatistics Activity, is the other system of records containing relevant data on Issue 14. The Central Registry contains data on all reported cases of substantiated or suspected spouse and child abuse in the Army. This information is compiled from the reports made by each installation Family Advocacy Case Management Team (FACMT).[26]

A comparison of the data on all substantiated reports of spouse and child abuse committed by soldiers and civilians alike during the two periods 1 July 1985 through 30 June 1986 and 1 July 1986 through 30 June 1987 is at appendix A. Appendix B reduces the figures in appendix A to annual averages for each category of abuse involving soldier-offenders and compares those averages to the corresponding figures obtained from the Office of Clerk of Court on all general and special court-martial cases in the Army involving crime in the home[27] during the period 1 July 1986 through 30 June 1987.[28] Appendix C contains additional information on these court-martial cases that was obtained from the Army Central Registry[29] and the Office of Clerk of Court.

Analysis

Using the data bases from these two systems of records, let us now examine the tentative conclusions upon which Issue 14 is premised.

Soldiers Are Being Tried by Court-Martial for Both Spouse and Child Abuse

The court-martial statistics can best be examined by breaking them down into three types of abuse: spouse abuse, child abuse not involving sexual abuse, and child sexual abuse. Although the reported instances of substantiated spouse abuse far exceed those involving all forms of child abuse,[30] the number of court-martial cases involving spouse abuse are very few in number. Indeed, only one out of every 542 soldiers whose abuse of his spouse has been reported to—and substantiated by—the installation FACMT is tried by court-martial for a spouse-abuse related offense.[31] Even when a court-martial occurs, the spouse abuse almost always involves a homicide or the spouse-abuse related charges are accompanied by unrelated, but more serious charges.[32]

Soldiers are also rarely tried by court-martial for child abuse not involving sexual abuse. The reported instances of

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[26] AR 608–18, paragraph 5–2*c*(1).

[27] The author acknowledges the assistance of Major William G. Stokes, Office of Clerk of Court, U.S. Army Legal Services Agency, who figured out the way to retrieve this data and provided the computer print-outs from which the information about court-martial cases involving abuse-related offenses was obtained. The computer database maintained by the Office of Clerk of Court was used to retrieve information on all cases referred to trial by general or special court-martial where an accused was arraigned upon charges that arose out of spouse or child abuse. Because court-martial cases involving spouse or child abuse are not designated as such by those who report to, or maintain this information at, the Office of Clerk of Court, this information was retrieved by searching the database for all cases in which the alleged victim of an offense was identified as either a minor dependent of the accused (which in each reported case was a child or step-child of the accused) or an adult dependent of the accused (which in each reported case was the wife of the accused). Cases involving these victims were reviewed for charges involving various offenses, which are listed at appendix D as involving potential spouse abuse, child abuse or both. The review included not only consummated offenses, but also attempts to commit the listed offenses, and solicitation of or conspiracy to commit the listed offenses. Only offenses involving force were included. A few reported cases involved other, non-violent offenses where the spouse was the alleged victim. These cases, which included forgery, larceny, drawing a check with insufficient funds, adultery, and wrongful cohabitation, were excluded from the study.

[28] This study includes all court-martial cases referred to trial by general or special court-martial upon which a court-martial convening authority took action pursuant to UCMJ art. 60 during the period 1 July 1986 through 30 June 1987. There were 83 courts-martial and all involved male offenders.

[29] The Army Central Registry was provided the rank, full name, and Social Security Account Number on each of the 83 soldiers tried by court-martial during the period 1 July 1986 through 30 June 1987. The Army Central Registry, however, did not have a record on the incident of abuse that was the subject of court-martial charges on 26 (or 31%) of these cases. Sixty-nine of the 83 soldiers were convicted; the Army Central Registry was unable to provide a record of the abuse incident in 21 (or 30%) of these cases. This was the first time a test was done on the accuracy of the data in the Army Central Registry, although that was not the purpose of the study. The author has always had doubts about the general accuracy of the findings made by installation FACMTs, but up until now no one ever had any reason to doubt that reports were not being submitted on all substantiated cases—or at least on those that should have been substantiated. Whether the failures pertain to bad findings or to incomplete reporting, or both, the Army Central Registry should be used with a great degree of caution in performing background employment and certification checks for child care providers and others working within Child Development Services or Youth Activities. The fact that there is or is not a record on a particular individual should not be given great weight in the absence of obtaining independent information to substantiate the entries that exist and performing other types of background checks where no entries exist. *See* AR 600–18, para. 3–25*b*.

[30] There were 11,931 substantiated reports of spouse abuse and 5,488 substantiated reports of child abuse (both of a sexual and non-sexual nature) involving both male and female soldier-perpetrators during the period 1 July 1985 through 30 June 1987.

[31] This was computed by dividing the average annual number of substantiated reports of spouse abuse involving both male and female soldier perpetrators during the period 1 July 1985 through 30 June 1987 (5,965.5 reports) by the number of court-martial cases involving spouse abuse-related charges during the period 1 July 1986 through 30 June 1987 (11 cases). Because there may be as much as a 30% underreporting to the Army Central Registry on all abuse, the frequency of courts-martial involving spouse abuse-related crimes may be even less than one in 542. *See supra* note 29.

[32] During the period 1 July 1986 through 30 June 1987, no soldiers were tried by court-martial for offenses that involved only spouse abuse. The few soldiers who were tried by court-martial for crimes involving spouse abuse either were accused of killing their spouses (one case)—making the issue of protecting "family member retirement benefits" moot—or they were charged with additional crimes involving child abuse (two cases) or crimes unrelated to either spouse or child abuse (seven cases, only two of which resulted in a conviction). In each instance, the child abuse-related and the unrelated charges in all these cases were much more serious in nature than those involving spouse abuse. Indeed, it was quite apparent, in light of the number and seriousness of these charges and the number of findings of not guilty entered as to the spouse abuse-related charges, that the single charge involving spouse abuse (usually simple assault and battery) in each case generally was tossed in for good measure, and would not by itself have likely resulted in the accused being tried by court-martial.

child abuse not involving sexual abuse far exceed the reported instances of child sexual abuse,[33] but the latter account for most of the court-martial cases involving all abuse-related crimes. Only one out of every 183 soldiers whose non-sexual abuse of his child has been substantiated by a FACMT is tried by court-martial, but one out of every six soldiers is tried by court-martial when child sexual abuse is substantiated by a FACMT.[34] Almost half of the court-martial cases involving the non-sexual abuse of children involved either a homicide or unrelated charges.[35]

The primary reason that crimes involving child sexual abuse are tried by court-martial more frequently than other types of abuse-related offenses is that these are the most serious offenses in terms of abhorrence to society and the maximum possible confinement. The seriousness of these crimes is reflected not only in the law, but also by the actions of those charged with enforcing the law.[36] The law makes no distinction between a man who rapes his daughter and one who rapes the daughter of his neighbor.[37]

On the other hand, most reported incidents of spouse abuse usually involve nothing more than a simple assault and battery. The same is true with regard to most reported instances involving the physical, nonsexual abuse of children, although here, the same assault against a child is properly considered more serious under the law than if committed against a spouse. The generally more serious nature of abuse-related crimes involving children, as compared to adults, undoubtedly accounts for the higher rate of court-martial cases involving both the sexual and, to a lesser extent, the nonsexual abuse of children.[38]

It should be clear from the foregoing that there would be no Issue 14 were it not for soldiers who get tried by court-martial for crimes involving child sexual abuse. These are the only type of offenses that really merit any attention in addressing Issue 14.

Convicted Soldiers Are Eligible for Military Retirement and Are Losing Retirement Benefits

Very few soldiers who are eligible for military retirement—that is, who have served over twenty years active military duty[39]—are tried by court-martial for spouse or child abuse-related offenses. This is not surprising. Those familiar with military court-martial practice know that it is a rare case indeed when a soldier eligible for military retirement gets tried by court-martial for any offense. Long before the time a soldier completes twenty years of active military service, any serious character flaws will likely have been flushed out, particularly if they involve criminal activity. Those soldiers seldom ever become eligible for military retirement.

The same is true with regard to abuse-related offenses. The statistics establish that almost all soldiers who are tried by court-martial for abuse-related offenses have less than twenty years of active military service.[40] Those who assault their wives and physically, but not sexually, abuse their children get caught very early in their military careers. They generally have little investment in their military careers and are low in rank.[41] These soldiers probably do not differ significantly in age and maturity from most soldiers who are tried by court-martial for crimes committed outside the family.

On the other hand, soldiers who sexually abuse their children constitute almost all of the soldiers who are tried by court-martial for abuse-related offenses who have any significant investment in their military careers.[42] But even here, their investment generally is short of that required for

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[33] There were 4,751 substantiated reports of soldiers whose abuse of their children was non-sexual in nature, and only 737 substantiated reports of soldiers who sexually abused their children during the period 1 July 1985 through 30 June 1987.

[34] This was computed by dividing the average annual number of substantiated reports of child non-sexual abuse (2,375.5 reports) and child sexual abuse (368.5 reports) involving both male and female soldier perpetrators during the period 1 July 1985 through 30 June 1987 by the number of court-martial cases involving child non-sexual abuse-related charges (13 cases) and child sexual abuse-related charges (61 cases), respectively, during the period 1 July 1986 through 30 June 1987. As with spouse abuse, because there may be as much as a 30% underreporting to the Army Central Registry on all abuse, the frequency of courts-martial involving child abuse may be even less than these figures indicate. *See supra* note 29.

[35] Of the 13 court-martial cases involving charges arising from a soldier's non-sexual abuse of his child or children, three cases involved a homicide relating to the child's death, one case involved charges relating to spouse abuse, and two cases involved charges unrelated to either spouse or child abuse.

[36] *See* appendix D for a comparison between the maximum authorized confinement upon conviction under the UCMJ for crimes involving spouse and child abuse. Of the 83 reported court-martial cases during the period 1 July 1986 through 30 June 1987 involving crime in the home, 75 cases were referred to trial by general court-martial, six cases were referred to trial by a special court-martial empowered to adjudge a bad-conduct discharge, and two cases were referred to trial by special court-martial not empowered to adjudge a discharge. All 61 cases involving child sexual abuse were referred to trial by general court-martial.

[37] Some might argue that the incest offender is often more amenable to treatment that the child molester who sexually assaults children other than his own. *See* Attorney General's Report, *supra* note 13, at 37. Those who accept this premise go on to argue that a social treatment response rather than a so-called "criminal/punitive response" should be used in handling incest offenders. *See* The American Humane Society, Criminal or Social Intervention in Child Sexual Abuse: A Review and a Viewpoint at i (Jan. 1982). Any criminal justice system that authorizes a more lenient approach (in law and practice) with regard to sexual offenders who target their own children, however, removes those children from the same protection that the law affords to other children. In effect, the sex offender's own children become fair game while only those outside the family are placed off-limits. The UCMJ makes no distinction between sexual offenses committed against children in or outside of the family.

[38] *See* appendix D for a comparison between the maximum authorized periods of confinement authorized upon conviction for crimes committed against children and adults.

[39] Generally, a soldier must serve 20 years of military active duty before becoming eligible for voluntary nondisability retirement. *See* 10 U.S.C. §§ 1293, 3911, 3914 (1982).

[40] Of the 83 soldiers tried by court-martial for crime in the home during the period 1 July 1986 through 30 June 1987, 42 had ten or more years of active military service, and 41 of these soldiers were tried for crimes involving child sexual abuse. Just four soldiers, all of whom were charged with crimes involving child sexual abuse, had more than 20 years service and hence were eligible for military retirement at the time of their court-martial. Only two of these four were convicted, and neither of them was sentenced to a punitive discharge.

[41] Twenty of the 21 soldiers tried by court-martial during the period 1 July 1986 through 30 June 1987 for offenses involving spouse abuse and the physical, non-sexual abuse of their children had less than 10 years of active military service.

[42] During the period 1 July 1986 through 30 June 1987, 41 of the 61 soldiers tried by court-martial for child sexual abuse had 10 or more years of active military service.

military retirement. Most are in the grades E5 through E7[43] and have between 10 and 20 years of active military duty.[44] This is the stage in a soldier's military career where he is likely to have children of an age who, if they are sexually abused, will report it to someone who will both believe them and act upon that report. The court-martial statistics reveal that most of the victims of child sexual abuse are children twelve years of age and older.[45] Older children who are victims of sexual abuse in the family are not only more likely to report the abuse, but also make better witnesses.

Soldiers have no vested interest in a voluntary nondisability military retirement until they actually retire from active duty. Those soldiers who serve less than twenty years generally are not entitled to retired pay, regardless of whether their separation is voluntary or forced. It is clear from the statistics, however, that only rarely are soldiers who are eligible for military retirement tried, convicted, and punitively discharged by court-martial for abuse-related offenses. No such case was uncovered during the one-year period examined; one might conclude that when this occurs, it is only for the most serious of abuse-related crimes.[46]

Family Members Have—or Should Have—Entitlements to Lost Retirement Benefits

As has been established, retirement-eligible soldiers accused of crime in the home are not being tried by court-martial to any significant degree, and, even when they are, they are not losing their military retirement benefits as a result of a conviction and sentence by court-martial. If retirement-eligible soldiers are not losing these benefits, then neither are their wives or children to the extent that they have any claim to those benefits.

Issue 14 probably should be given a broader reading so that it includes not only the loss of benefits by retirement-eligible soldiers and their families, but also the loss of potential benefits by those not yet eligible to retire. But where does one draw the line? All those on active duty have the opportunity to serve twenty years and retire, even if they do not have the desire to do so. Even those with the desire may not have the potential because of physical limitations, a lack of mental aptitude, or a military record that reflects a mediocre (or even less than outstanding) performance of duty or the presence of minor misconduct. Needless to say, serious misconduct is almost always a disqualifier, and abuse-related misconduct is not treated any differently.

It is difficult to draw any line, and given the small number of soldiers who are tried by court-martial for crime in the home, it is probably unnecessary to do so. Issue 14, after all, does not address other forms of separation from the Army. A soldier may also be administratively separated from the Army for an abuse-related offense.[47] Even when this does not occur, an enlisted soldier may eventually be forced to leave the Army before becoming eligible for military retirement because he has been barred from reenlistment.[48] For similar reasons, an officer may be passed over for promotion and be denied the opportunity for continued active duty.[49] An enlisted soldier may also voluntarily request a discharge for the good of the service,[50] or an officer may resign in lieu of court-martial rather than face criminal charges for an abuse-related offense.[51] Even in the absence of court-martial charges, an

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[43] During the period 1 July 1985 through 30 June 1987, 75% of all substantiated reports of male soldiers who sexually abused their children were in the three pay grades E5 through E7. Of the 61 male soldiers tried by court-martial during the period 1 July 1986 through 30 June 1987 for crimes involving child sexual abuse, 78% were in pay grades E5 through E7.

[44] *See supra* note 42.

[45] Of the 61 court-martial cases involving child sexual abuse charges during the period 1 July 1986 through 30 June 1987, only two cases did not involve female child victims. Of the 59 cases that did, 47 cases involved girls 10 years of age and older. Not all child sexual abuse cases involved incest insofar as this supported by the charges alleged (*i.e.*, carnal knowledge or rape), but in light of the many severe sentences adjudged, it is reasonable to assume that a large number of these cases involved the presentation of evidence that incest was involved in the particular crimes charged. (Only 39 of the 61 court-martial cases involving child sexual abuse had records in the Army Central Registry as to the specific age of the children involved. These 39 cases involved 52 child victims, over half of whom were 12 years of age or older. Fourteen cases involved children 15 years of age and older. Half of all reported cases involved soldiers who were step-fathers to the children they molested.) The fact that a large number of girls who were sexually abused were over the age of 10 when the abuse was reported does not mean that the pattern of sexual abuse did not begin before the age of 10. In some cases, the girls may have only reported the abuse after they became older or, if reported earlier, they may not have been believed until they got older or until they later reported it to someone outside their family. Reports to the mother are not always believed, and, even when they are, the mother does not always take actions that will end the abuse. Doctor Vincent J. Fontana, M.D., a pediatrician and noted expert in the area of child abuse, addressed the subject of the mother's role in father-daughter incest in the following manner:

> Father-daughter incest, the most-reported form of intrafamily sexual abuse of children, often occurs in families in which the total dynamics of the family are seriously awry. The mother's role may vary from complete lack of knowledge to unconscious denial or willful ignorance, to in some cases acting as an accomplice to the sexual abuse. Whether her involvement is conscious or unconscious, the mother's denial allows the abuse to continue.

See National Committee for Prevention of Child Sexual Abuse, Dealing with Sexual Child Abuse 2 (2d ed. 1982).

[46] The statistics reveal that a small number of higher ranking officers and warrant officers and a larger number of higher ranking enlisted soldiers, many of whom presumably would be retirement eligible, were identified to the Army Central Registry as offenders in substantiated cases of child sexual abuse, but were not tried by court-martial. Some of these cases may not have been prosecuted because of the insufficiency of the evidence, and other cases may have resulted in administrative discharges for the soldiers involved. More likely, the disproportionately small number of prosecutions in these cases is attributed to the exercise of discretion on the part of the commanders of the soldiers involved in deciding the disposition of these cases. There is, as there should be, a natural hesitancy on the part of military judges and court-members to adjudge a punitive discharge (and hence a loss of all military retirement benefits) in court-martial cases for all but the most serious of charges. As with other crimes of equal gravity involving retirement eligible soldiers, commanders will frequently provide a soldier the option of retiring as quickly as possible—an opportunity the soldier will seldom forego in light of the alternative of facing court-martial charges and a possible loss of military retirement benefits.

[47] *See* AR 635–100, para. 5–12, regarding elimination of officers for misconduct or moral or professional dereliction, and AR 635–200, para. 14–12*c*, regarding discharge of enlisted soldiers for commission of serious offenses.

[48] *See* AR 601–280, para. 6–4*d*, regarding procedures for denying reenlistment to soldiers involved in immoral acts and other misconduct.

[49] *See* AR 635–120, ch. 11, regarding the elimination of certain officers not selected for promotion.

[50] *See* AR 635–200, ch. 10, regarding requests for discharge by enlisted soldiers pending trial by court-martial.

[51] *See* AR 635–120, ch. 5, regarding officer resignations for the good of the service in lieu of court-martial.

enlisted soldier may voluntarily leave the service at the expiration of an enlistment—or an officer may request to resign—because a military police investigation of an abuse-related offense has ruined any prospect for promotion or has brought disgrace upon the soldier and his family in the military community.

More is involved here than just the loss of retired pay. Regardless of the type of discharge and the procedure by which it is obtained, if the soldier leaves military active duty before becoming eligible for military retirement, he and his family will suffer a loss of current income from military pay and the loss of any prospect they had of financially benefiting from military retired pay in the future. There are also many non-monetary benefits, such as post exchange, commissary, and medical benefits,[52] that are lost to varying degrees to a soldier and his family when he leaves active duty, whether voluntarily or involuntarily, before becoming retirement eligible.

In many states, retirement benefits, including a soldier's military retired pay, are treated as marital or community property that is subject to division between husband and wife in a marital separation or divorce. The Uniformed Services Former Spouses' Protection Act, authorizes direct payments[53] from retired pay to a spouse (or former spouse) under certain circumstances. Federal law also authorizes involuntary allotments from military pay[54] and garnishment of military and retired pay[55] to enforce state child support and alimony orders. A soldier's spouse (or former spouse) and children face loss of entitlements for all this and more,[56] regardless of whether the soldier is punitively discharged by court-martial for an abuse-related offense or decides to leave—or is forced to leave—the Army before becoming retirement eligible.

Certainly, the Army has an obligation to the soldier's family. But so too does the soldier. The Army can do little to protect the interests of family members, by legislation or otherwise, when the soldier, by his own misconduct, is the one that threatens those interests. The Army is not a social agency and the social programs that do exist within the Army, such as the Army Family Advocacy Program, can only be justified in the annual Defense and Army budgets to the extent that these programs enhance mission readiness and soldier retention.[57] If the soldier is more of a detriment than an asset to the military mission, then there is no reason for retaining him within the military community. The only possible obligation the Army might owe to the family under such circumstances would be to ease their reentry back into the civilian community.[58]

Any statutory or regulatory[59] entitlement that family members have to military retirement benefits is derived from the soldier's entitlement to these benefits. If the soldier loses—or never earns—these benefits, then the family has no claim to these benefits either. Although one might argue that the law should be changed so as to protect these benefits, this, as will be discussed, would not only be difficult to justify, but also difficult to accomplish without radically changing the entire military retirement system of benefits. And, as the court-martial statistics clearly demonstrate, the protection of "family member retirement

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[52] 10 U.S.C.A. §§ 1071–1102 (West Supp. 1987).

[53] 10 U.S.C.A. § 1408 (West Supp. 1987).

[54] 42 U.S.C. § 665 (1982).

[55] 42 U.S.C. § 659 (1982).

[56] *See* e.g., 10 U.S.C.A. §§ 1431–1455 (West Supp. 1987), regarding the election a retiring soldier may make to provide an annuity on behalf of a surviving spouse by receiving a reduced amount of retired pay.

[57] For example, the law provides medical benefits, of which family advocacy services are part, to "create and maintain high morale" in the military services among active duty and retired members and their families. *See* 10 U.S.C. § 1071 (1982). Given the fact that a large number of the perpetrators of spouse and child abuse in the Army are soldiers, one might question how preventing abuse would enhance soldier morale. One answer could be that by tackling and treating the problems that give rise to spouse and child abuse, the Army can transform a troubled soldier into one who will be happier and more content with his family life and better able to manage stress and negotiate differences, and who, as a result, will be a more effective soldier on duty.

There is less justification for the Army Family Advocacy Program, in the author's opinion, with regard to soldiers who sexually abuse their children. If the Army builds morale to promote retention, one must first seriously question whether such soldiers—who are relatively small in number, but many of whom undoubtedly have severe psychological problems in need of lengthy and intensive treatment over a term of years—are the type of soldiers and officers we need to retain in the Army. As this study shows, many of these soldiers and officers are senior in rank and undoubtedly occupy positions of leadership—at least before they are apprehended. If they hold certain military occupational specialties, such as law enforcement or military intelligence, their future usefulness to the Army is almost nil. If their sexual abuse of their children is a matter of public record, because they have been apprehended or prosecuted, by either civil or military authorities, any usefulness they may have had as leaders is also compromised. In the author's opinion, the primary effort of the Army Family Advocacy Program in child sexual abuse cases should be directed at encouraging the reporting and treating the victims of such abuse. Of course, if the offenders can be treated or rehabilitated, that should be attempted. In light of the foregoing discussion, however, that would be difficult to justify, in a military context or in a military budget that will be subject to increasing cuts in the funding of family programs over the next several years, for serious crimes committed over a long period of time with great psychological harm to the children who are victimized.

Although there are those who naively suggest that discharging experienced soldiers who sexually abuse their children without making long-term efforts at rehabilitating them constitutes a waste of military resources, the author would argue that the administrative bureaucracy and medical support system that would have to be established to support a deferred prosecution program and an organized and disciplined therapeutic process for these few offenders would be what would really constitute a waste of military resources. This is especially true because so many more soldiers, just as experienced, are discharged or not allowed to reenlist before becoming retirement eligible, for a variety of other problems, such as obesity or lack of physical fitness, that are more readily treatable at less cost.

[58] *See* 10 U.S.C.A. § 1076(e)(1) (West Supp. 1987), which authorizes one year of military medical and dental care for abuse-related injuries or illnesses suffered by dependents of service members discharged or dismissed by court-martial for an abuse-related offense. *See also* 37 U.S.C.A. § 406(h) regarding the transportation of a service member's dependents, baggage, and household goods when, under specified circumstances, the service member receives a less than honorable administrative discharge or a punitive discharge in the United States. (Formerly, such transportation was only authorized for service members discharged in this manner outside the contiguous 48 states.)

[59] For an example of some military retirement benefits governed by regulation, where entitlement of the family member is based on the retired military status of the sponsor, *see* Dep't of Army, Reg. No. 215–2, The Management and Operation of Army Morale, Welfare, and Recreation Programs and Nonappropriated Fund Instrumentalities (31 Oct. 1986), paras. 2–3*a*(1)(*b*) (Class VI or package beverage stores), 2–4*a*(4) (golf and other installation sports activities), and 2–6*b*(3) and 5–13*a* (Army clubs).

benefits" is unnecessary as to those soldiers who are retirement eligible at the time they are accused of abuse-related crimes.[60] The small number of criminal actions indicate either that the problems are not as serious with those who are retirement-eligible, or that the problems that do arise are dealt with through noncriminal means.

There Is a Need for Guidance on Handling Abuse-Related Crimes

Issue 14 suggests that commanders are in need of "guidance" on handling the cases of soldiers who are accused of crimes involving spouse and child abuse, and that they are failing to properly take into account the interests of the soldiers' families in the manner they are presently handling these cases. It is important to keep in mind that the only type of abuse relevant to Issue 14 is child sexual abuse.[61] Although there is no doubt that commanders and lawyers, as well as social workers, could all benefit from additional training on the handling of these cases, the use of the word "guidance" in Issue 14 reveals that the perceived problem is one of changing the attitudes of commanders and lawyers toward these cases,[62] not one of enhancing the skills they already possess.

There are those who suggest that lawyers and commanders should defer to the expertise of social workers and other professionals before deciding whether or not to initiate court-martial charges for abuse-related crimes.[63] This suggestion is based on the observation that while commanders can best determine those who have the potential for further military service, only the experts can best determine whether the abuser is "motivated" to change his behavior for the better and is capable of being treated for the disorder that gave rise to the abuse.[64]

The prospect for rehabilitation, however, is only one of several considerations that goes into the decision on whether or not a soldier—or any one else—should be prosecuted and punished for committing a crime—any crime. For social workers who handle child sexual abuse offenders in the Army, rehabilitation is an overriding consideration that is directly tied to other concerns about protecting the child from further abuse, saving the marriage, maintaining the financial well-being of the family, and thereby ensuring as best as possible that the child will be cared for in the future.[65]

Commanders and military lawyers are not without compassion on these matters, but they recognize, as they must, that the Army is not a social agency. When soldiers are prosecuted and punished for serious crimes, their families suffer, whether the crimes were committed against them or not. This is an unintended and regrettable consequence of crime and punishment. Although some of the adverse effects that punishment has on the soldier's family can be ameliorated by legislation[66] or by the type of sentence that is adjudged and approved,[67] concerns about family cannot be allowed to dictate the disposition of criminal cases.[68]

There are other considerations involved in punishing child sexual abusers, not the least important of which is maintaining military discipline. The purposes of punishment, after all, go beyond just rehabilitating the offender, and include such ends as general and special deterrence, isolating dangerous offenders from society, and retribution—that is, enforcing the proposition that a wrongful act must be punished because, to not do so, would be to decriminalize the conduct.[69] Likewise, if serious crime is not punished with severe punishment, it can hardly be said that society considers that crime as serious, regardless of what may be the maximum authorized punishment.

In the Army, those accused of crimes involving child sexual abuse frequently are senior noncommissioned officers with unblemished military records.[70] This makes the decision on whether to prosecute in certain cases all the more

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[60] *See supra* note 40.

[61] *See supra* notes 30 through 35 and accompanying text.

[62] *See* Child Abuse, A Report From the Department of Defense Child Sexual Abuse Policy Development Conference 17 (Sept.' 18–19, 1985) [hereinafter Child Abuse], wherein it is suggested that changing the philosophy of commanding officers can result in changes in local practices. Court-martialing child sexual abusers, which often eliminates the military benefits of the families involved, is the local practice that is deemed in need of change because prosecution is viewed as detrimental to the successful treatment of child sexual abusers in the military.

[63] *See* Department of the Navy Military Personnel Command, The Navy Family Advocacy Program—Legal Deskbook 56 (1987) [hereinafter Deskbook]. The Army is said to have no policy on the disposition of cases involving child sexual abuse. *See* Child Abuse, *supra* note 62, at 8. This is not entirely true, but when Army procedures are compared to those of the Navy's this is hard to deny. The Navy has exempted incest from mandatory processing for discharge and requires all such cases to be referred to the Department of Navy headquarters for evaluation before a commander can initiate court-martial or administrative discharge proceedings. *See* Child Abuse, *id.* at 9. Not surprisingly, there are very few courts-martial in the Navy for crimes involving child sexual abuse. The Army could also go this way in the future if the Army Family Advocacy Program is not carefully monitored by the Office of The Judge Advocate General and others concerned with protecting the authority and discretion that commanders presently have in handling these cases under the Manual for Courts-Martial. The Office of The Judge Advocate General for the Army is opposed to any regulatory scheme that would "limit the role of law enforcement officials, the commander, or his legal advisor, in disposition of cases of child sexual abuse." *See* DAJA-CL 1985/6304 (DACF-FSA/23 Oct. 1985) 1st End, 30 Dec. 1985, subject: Family Advocacy Action Plan II—Sexual Molestation Initiative.

[64] Deskbook, *supra* note 63, at 55–56.

[65] *Id.* at 54.

[66] Legislation has been implemented with regard to some medical and transportation entitlements. *See supra* note 58.

[67] Of the 54 soldiers convicted by general court-martial for crimes involving child sexual abuse, seven did not receive a punitive discharge or confinement as part of their approved sentence. Fourteen soldiers received only a partial forfeiture of pay, while 21 other soldiers received no forfeiture of pay as part of their approved sentence. Eight soldiers were not reduced to the lowest enlisted grade as part of their sentence. All this suggests that family situations *are* being considered in appropriate cases in the sentencing of child sexual abusers. It also rebuts the absurd statement made to the author by a staff member of a particular U.S. Senator that "the Army response to all cases of child sexual abuse is rather automatic—court-martial and 50 years confinement." The problem is obviously one of perception rather than one that is supported by fact.

[68] If the welfare of a soldier's wife and children were to be given great weight in all decisions regarding the disposition of military offenders, then only unmarried soldiers without children would be punished severely for serious crime.

[69] G. Newman, The Punishment Response 192 (1978).

[70] *See supra* note 43. These soldiers would not have the senior ranks they have achieved without possessing unblemished military records.

difficult. Many social workers undoubtedly lose much credibility by consistently evaluating soldiers accused of crimes involving child sexual abuse as being amenable to treatment and rehabilitation, which unfortunately makes their opinions an almost neutral factor in the prosecution decision.

But a commander does not need more "guidance" to assist him in this decision. That guidance already exists in the Manual for Courts-Martial[71] and the applicability of this guidance is no different to these particular offenders than it is to other offenders. There is also regulatory guidance in the Army regarding the disposition of abuse-related crimes.[72] The statistics from the Army Central Registry and the Office of Clerk of Court appear to substantiate that this guidance is being followed. As mentioned, only about one in six soldiers identified in substantiated cases of child sexual abuse is being tried by court-martial for his crimes.[73] The crimes that are being prosecuted are very serious as evidenced by both the level of referral and the severity of the sentences being adjudged and approved.[74] In addition, many of the prosecuted cases of child sexual abuse involved multiple victims, many of whom were older girls. This probably indicates that the abuse in many instances was not only widespread, but occurred over a long period of time before it was reported and prosecuted.[75] Finally, half of the cases prosecuted involved soldiers who were stepfathers to the children they sexually assaulted. In some situations, a soldier may have married the mother to gain access to her children.[76] These are generally not the type of cases that invoke sympathy for the soldier or strong sentiment for keeping him in the home in order to maintain the family as a unit or to save the marriage.

Issue 14 also suggests that commanders and military lawyers should consider "family cooperation" in determining the disposition of cases involving abuse-related crimes. Family members, as the victims of these crimes, do have consultation rights under the Victim/Witness Assistance Program.[77] Nevertheless, the fact that a member of the family reported the crime, and cooperated in investigating and prosecuting the soldier, should not necessarily control the subsequent disposition of the case. Punishment should fit both the offender and the crime.[78] While it may be appropriate in some cases to lessen the effect that a court-martial sentence might have on innocent family members—such as by not adjudging or approving total forfeitures as part of the sentence, for example—this type of consideration should be related to family financial needs, and not dependent on their cooperation at trial. In any event, the statistics suggest that commanders are taking only the strongest evidentiary cases to trial. Although family members may be cooperating during the investigation of crimes involving child sexual abuse, their assistance at trial is often not required. The percentage of guilty pleas and convictions in these cases does not differ significantly from court-martial cases involving other types of crimes.[79] This is probably because prosecution of these crimes, like others, is often assisted by the presence of an admissible confession by the accused as to the offense charged.

In summary, commanders and military lawyers already have more than adequate guidance on handling crimes involving child sexual abuse, and they appear to be applying that guidance very well. Only the most serious crimes are being tried by court-martial, and military judges and court members appear to be considering the interests of the families by the type of sentences that are being adjudged and approved.

Perceived Problems Involving Loss of Retirement Benefits in Abuse Cases Can Be Solved With Legislation

Because almost all abuse-related crimes tried by court-martial involve child abuse, one might seriously question the need to protect "family member retirement benefits," as those benefits, when they are not lost, are usually enjoyed by the soldier and the spouse, not the children. Children have no legal claim to a parent's military retirement benefits. Whatever benefits they derive from a parent's military retired status are indirect at best and, in any event, disappear when they reach the age of eighteen years or complete their formal education. Given the older age of most of the child victims in these cases, the period during which they might enjoy such benefits, such as military youth activities or commissary or post exchange privileges, is only a few years at best.

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[71] R.C.M. 306 and the discussion following it directs that offenses should be disposed of at the lowest appropriate level, including no action at all. Among the factors that a commander is directed to consider are some of the following: the character and military service of the accused; the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline; the appropriateness of the authorized punishment to the particular accused or offense; and the reluctance of the victim or others to testify.

[72] AR 608–18, para. 4–4 directs commanders to "consider FACMT recommendations when taking or recommending disciplinary and administrative actions against soldiers in spouse and child abuse cases which may be detrimental to a soldier's continued military career or future promotion opportunities, or the financial well-being of his or her family members." The regulation also directs commanders to consider "the interests of justice," "the needs of the accused," the "seriousness of the alleged offense," matters in aggravation and mitigation, and "the accused's potential for rehabilitation."

[73] *See supra* note 34 and the accompanying text.

[74] *See supra* note 36. Of the 54 soldiers convicted by court-martial for crimes involving child sexual abuse, 25 soldiers had approved sentences to confinement for terms between one and five years, nine soldiers for terms between 5 and 10 years, and 11 soldiers for terms for 10 years or more.

[75] *See supra* note 45 and accompanying text.

[76] *See* The National Center for Missing & Exploited Children, Child Molestors: A Behavioral Analysis for Law Enforcement Officers Investigating Cases of Child Sexual Exploitation 9 (1986), indicating that pedophiles sometimes marry women just to gain access to children, which sometimes results in "serial marriages:" "Such individuals frequently look for women who already have children who meet their age and gender preferences. Their marriages usually last only as long as there are children in the victim preference range." After the marriages end, they marry (or just move in with) another woman who has children of the desired age and gender.

[77] *See* Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice ch. 18 (1 Aug. 1984).

[78] R.C.M. 306(b) discussion.

[79] During the period 1 July 1986 through 30 June 1987, there were 1,483 soldiers tried by general court-martial. Of those tried, 1,381 (or 93.1 percent) were convicted and 911 (or 61.4 percent) were convicted pursuant to their pleas of guilty. During the same period, there were 61 soldiers who appeared before general court-martial in the Army for crimes involving child sexual abuse. Out of these 61 soldiers, two were administratively discharged. Of the 59 who were tried, 54 (or 91.5 percent) were convicted and 42 (or 71.2 percent) were convicted pursuant to their pleas of guilty.

If the issue is really one of protecting the family's interest in the soldier's military retirement benefits, the question arises as to why this should be done in court-martial cases involving only abuse-related crimes, and not in others. There is nothing peculiar about court-martial cases involving child sexual abuse offenses that would appear to justify protecting the mother's claim to her husband's military retirement benefits. Indeed, in some cases, such as where the mother has known—or should have known—of the sexual abuse of her child and did not report it,[80] there may be even less justification for protecting these benefits.

If the theory is that an "innocent" spouse should not be made to suffer for the wrongdoing of the soldier, then the type of crime or misconduct that results in the premature elimination of the soldier from the Army becomes irrelevant. And so too is the means by which the soldier is eliminated. If this is the case, then Issue 14 misses the target of the perceived injustice by a wide margin. This is especially true because retirement-eligible soldiers are rarely tried by court-martial for abuse-related offenses or are denied their military retirement benefits as a result of a sentence by court-martial.[81]

Perhaps the focus should be on military pay and the fact that a number of soldiers leave—or are forced to leave—the Army before becoming eligible for voluntary retirement for all sorts of misconduct and duty performance deficiencies.[82] What might be suggested is that the law be changed to allow a spouse to collect some portion of the military retired pay that the soldier otherwise could have collected if he would have remained—or been allowed to remain—on active duty. But it would be difficult to protect the spouse's potential claim without giving the soldier a vested interest in his military retirement pay as well. Any method devised could be easily circumvented and would discriminate against soldiers who were not married.

The problem is that whether military retired pay is protected in this manner after a soldier has served ten years, fifteen years, or some other period, such a proposal would require a radical revision of the military retirement system. The military nondisability retirement system is both a personnel management tool—designed to encourage both the reenlistment and retirement of soldiers—and an income maintenance device that provides "reduced compensation for reduced current services."[83] Although the law has been changed recently to allow a spouse to be awarded a portion of the military retired pay as marital property pursuant to a state court decree of divorce or separation,[84] this legislative change did not detract from the purpose or nature of the military retirement system.

The system is, as it has long been, noncontributory in nature—that is, it is funded, not by soldiers on active duty, but by Congress as part of its annual appropriation to fund the defense budget. Any change in the law to give soldiers (or their spouses) a vested interest in military retired pay before twenty years would be an expensive proposition that would have to be funded either by soldiers on active duty or by Congress via an increase in the defense budget. Funds from either source are not likely because, among other reasons, such a change would do violence to the very purpose of the military retirement system, which at present encourages soldiers to remain on active duty and to serve honorably for at least twenty years before becoming eligible to collect military retired pay.

As has been shown with regard to Issue 14, nothing is accomplished by just focusing attention on retirement-eligible soldiers because they are seldom tried by court-martial for any crime, and seldom lose their right to collect military retired pay by court-martial sentence or by administrative discharge or elimination. If a change in the law is proposed to protect whatever potential claim that a soldier's spouse might have in military retired pay before the soldier becomes eligible to collect this pay, the problem is one of drawing the line at the number of years of active duty that potential retired pay will be protected, justifying the expense involved, and saddling either the soldier or the taxpayer with the bill. It would be far easier, less expensive, and less damaging to the military retirement system not to prosecute abuse-related offenses at all, than to turn the entire military retirement system upside down just to protect the retirement interests of the few families involved in these cases. The justification for legislation or a change in practice, however, as this study has shown, is totally lacking.

Conclusion

Issue 14 is no issue at all. As has been demonstrated, soldiers generally are not being tried by court-martial for abuse-related crimes, except in cases where they have killed their wives or children, or have raped or otherwise indecently assaulted their children. Even in such cases, these soldiers seldom have served on active duty long enough to be eligible for military retirement.

The total number of abuse-related crimes being tried by court-martial is very small in relation to the total number of all substantiated reports of spouse and child abuse in the Army each year.[85] Furthermore, these court-martial cases do not even constitute a significant number of the courts-martials tried in the Army.[86] Accordingly, these cases are not significant in number either in the context of the Army Family Advocacy Program or the military justice system.

Not only are these cases insignificant in terms of numbers, but also any perception that these cases are resulting in an injustice to the families involved appears to be without merit. The statistics do not support such a perception; indeed, they support just the opposite conclusion—that is,

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[80] *See supra* note 45 and accompanying text.

[81] *See supra* note 40 and accompanying text.

[82] *See supra* notes 47 through 51 and accompanying text.

[83] McCarty v. McCarty, 453 U.S. 210, 212, 222 (1981).

[84] *See supra* note 53 and accompanying text.

[85] During the period 1 July 1986 through 30 June 1987, the 83 court-martial cases involving spouse and child abuse-related crimes constituted less than one percent of the average annual number (8,709.5) of substantiated reports of spouse and child abuse involving male and female soldier perpetrators during the period 1 July 1985 through 30 June 1987.

[86] During the period 1 July 1986 through 30 June 1987, the 83 cases involving spouse and child abuse-related crimes constituted less than three percent of the 2,904 cases tried by general and special court-martial during this period.

that commanders, military judges, and court members are exercising considerable judgment in the cases that are selected for prosecution, and, when there are convictions, in the type of sentences that are adjudged and approved. The guidance that already exists for commanders and military lawyers appears to be more than adequate, and there is no need whatsoever for legislation.

The problem of protecting children from the abuse and neglect in the home that threatens their lives, safety, and mental well-being should remain the primary effort of the Army Family Advocacy Program. Lawyers and social workers would do well to focus their efforts on this nobel aspect of the program, in which they share a common humanitarian concern. The few court-martial cases involving serious crimes of child abuse pale both in number and in significance to the total problem of child abuse and neglect in the Army. Concerns about the financial well-being of the spouses of those few soldiers tried by court-martial for these serious crimes seem almost trite when compared with the long-term needs of the children who have to overcome the serious emotional, psychological, and often physical harm inflicted upon them by their parents. Meeting the needs of these children requires not only an Army family action plan, but action by society as well.[87]

[87] A recommendation, based on this article, has been made to the General Officer's Steering Committee to drop Issue 14 from the Army Family Action Plan. *See* DA Pam. 608–41, para. 4–1.

Appendix A

Substantiated Spouse and Child Abuse Cases
Army Central Registry

1 July 1985–30 June 1987

	1 Jul 85 to 30 Jun 86	1 Jul 86 to 30 Jun 87	Annual average
1. Child Physical Abuse and Neglect [1]	3,629	4,543 [2]	4,186.0
a. Extrafamilial [3]	83	139 [2]	111.0
b. Intrafamilial [4]	3,746	4,404 [2]	4,075.0
(1) Non-soldier offenders [5]	1,477	1,922 [2]	1,699.5
(2) Soldier offenders	2,269	2,482	2,375.5
(a) Females	286	295	290.5
(b) Males	1,983	2,187	2,085.0
—death of victim [6]	2	9	5.5
2. Child Sexual Abuse [7]	602	815	708.5
a. Extrafamilial [3]	144	283 [2]	213.5
b. Intrafamilial [4]	458	532	495.0
(1) Non-soldier offenders [5]	83	170 [2]	126.5
(2) Soldier offenders	375	362	368.5
(a) Females	3	4	3.5
(b) Males [8]	372	358	365.0
E1	3	5	4.0
E2	1	3	2.0
E3	8	9	8.5
E4	45	35	40.0
E5	68	74	71.0
E6	125	116	120.5
E7	84	82	83.0
E8	11	12	11.5
E9	2	0	1.0
W1	1	0	0.5
W2	3	10	6.5
W3	5	2	3.5
W4	1	0	0.5
01	0	0	0.0
02	0	3	1.5
03	9	5	7.0
04	4	2	3.0
05	2	0	1.0
06	0	0	0.0
3. Spouse Abuse	6,670	8,085 [2]	7,377.5
a. Non-soldier offenders	734	2,090 [2]	1,412.0
b. Soldier offenders	5,936	5,995	5,965.5
(1) Females	321	283	302.0
(2) Males	5,615	5,712	5,663.5
—death of victim [6]	1	7	4.0

[1] These numbers reflect the total number of perpetrators of extrafamilial and intrafamilial child abuse or neglect not involving child sexual abuse.
[2] The large increase in the second reporting period in extrafamilial child abuse involving both soldier and non-soldier offenders, and in spouse abuse and intrafamilial child abuse involving non-soldiers probably is attributed to several factors. One, a new and simplier form (down from 7 pages to 2) made reporting to the Army Central Registry easier for family advocacy program managers. This form was first introduced in Europe on a test basis in April 1986 and in the rest of the Army in April 1987. Secondly, since 1986 there has been an increased emphasis on reporting abuse on all families eligible for receiving treatment in military medical treatment facilities. This would include almost all Department of Defense civilian employees and contractors, and their families, living overseas, and all military retirees. *Compare* Dep't of Defense Directive No. 6400.1, Family Advocacy Program (July 10, 1986), which first authorized this expanded reporting, with Department of Defense Directive 6400.1, Family Advocacy Program, which only authorized reporting on active duty personnel and their dependents. Finally, there has been an increased emphasis on reporting extrafamilial child abuse occuring in Army child care settings.
[3] Extrafamilial abuse generally involves a victim other than the offender's child or step-child.
[4] Intrafamilial abuse generally involves abuse committed by an offender against his or her child or step-child.
[5] Non-soldier offenders include military offenders assigned to the other armed services, civilians authorized medical care in military medical treatment facilities, and all military retirees.
[6] These number reflect the number of cases where the victim died as a result of the abuse inflicted.
[7] These numbers reflect the total number of perpetrators of any intrafamilial or extrafamilial abuse or neglect involving child abuse or exploitation.
[8] The breakdown of child sexual abuse offenders by rank is limited to male offenders since no female soldiers were tried by court-martial for any abuse-related offenses during the period 1 July 1986 through 30 June 1987.

Appendix B

Court-Martial Cases Involving Crime in the Home Compared with Reports of Substantiated Spouse and Child Abuse Cases

1 July 1986–30 June 1987

	Annual average reports [1]	Court-martial cases [2]
1. Intrafamilial Child Physical Abuse and Neglect by Soldiers [3]	2,375.5	13
a. Females	290.5	0
b. Males	2,085.0	13
—death of victim [4]	5.5	3
2. *Intrafamilial Child Sexual Abuse by Soldiers*	368.5	61
a. Females	3.5	0
b. Males [5]	365.0	61
E1	4.0	0
E2	2.0	0
E3	8.5	1
E4	40.0	6
E5	71.0	15
E6	120.5	16
E7	83.0	17
E8	11.5	0
E9	1.0	1
W1	0.5	0
W2	6.5	1
W3	3.5	0
W4	0.5	0
01	0.0	0
02	1.5	0
03	7.0	2
04	3.0	2
05	1.0	0
06	0.0	0
3. Spouse Abuse by Soldiers [6]	5,965.5	11
a. Females	302.0	0
b. Males	5,663.5	11
—death of victim [4]	4.0	3

[1] The annual average is based on the number of reports made to the Army Central Registry on substantiated cases of abuse involving soldier perpetrators during the periods 1 July 1985 to 30 June 1986 and 1 July 1986 to 30 June 1987.
[2] This column reflects those cases referred to trial by general or special court-martial involving charges related to spouse or child abuse upon which a court-martial convening authority took action pursuant to article 60, UCMJ during the period 1 July 1986 through 30 June 1987.
[3] These numbers reflect the total number of cases of child abuse not involving child sexual abuse, and includes cases of child abuse.

[4] These numbers reflect the number of cases where the victim died as a result of the abuse inflicted.
[5] The breakdown of child sexual abuse offenders by rank is limited to male offenders since no female soldiers were tried by court-martial for any abuse-related offenses during the period 1 July 1986 through 30 June 1987.
[6] These numbers reflect the total number of perpetrators of spouse abuse even if accompanied by child abuse.

Appendix C

Court-Martial Cases Involving Crime in the Home

1 July 1986–30 June 1987

TYPE OF OFFENSES UPON WHICH THE ACCUSED WAS ARRAIGNED		
Child abuse without child sexual abuse		
Child abuse alone—no fatality	7	
Child abuse alone—fatality	3	
Child abuse accompanied by spouse abuse	1	
Child abuse accompanied by charges unrelated to child or spouse abuse [1]	2	
Subtotal		13
Child abuse involving child sexual abuse		
Child sexual abuse accompanied by no charges other those relating to child abuse	48	
Child sexual abuse accompanied by spouse abuse	1	
Child sexual abuse accompanied by charges unrelated to child or spouse abuse [1]	12	
Subtotal		61
Spouse abuse		
Spouse abuse alone—no fatality	0	
Spouse abuse alone—fatality	1	
Spouse abuse accompanied by charges related to child abuse—included above (2 cases)	(2)	
Spouse abuse accompanied by charges unrelated to spouse or child abuse [1]—no fatality	7	
Spouse abuse accompanied by charges unrelated to spouse or child abuse [1]—fatality	1	
Subtotal	(11)	9
TOTAL		83

	Child sexual abuse	
	Involved in case [2]	Not involved in case
LOCATION OF TRIAL AND ACCUSED'S DOMICLE		
United States		
On-post quarters	25	5
Off-post quarters	8	2
Unknown [3]	15	4
TOTAL	48	11
Overseas [4]		
On-post quarters	7	4
Off-post quarters	1	3
Unknown [3]	5	4
TOTAL	13	11
TYPE OF COURT MARTIAL		
General court-martial	61	14
Special court-martial empowered to adjudge a bad conduct discharge	0	6
Special court-martial not empowered to adjudge a discharge	0	2
TOTAL	61	22
PLEA ENTERED AT TRIAL FOLLOWING ARRAIGNMENT		
Guilty Plea Cases		
A guilty plea was accepted to any charge or lessor included charge relating to an offense involving spouse or child abuse.	42	9
Not Guilty Plea Cases		
A guilty plea was not accepted to any charge or lessor included charge relating to any offense involving spouse or child abuse. These include all cases in which the accused entered a not guilty plea to all such charges as well as those to which no plea was entered and the charges were later withdrawn or dismissed following arraignment.	19	13
TOTAL	61	22
FINDINGS [5]		
Cases Involving a Finding of Guilty		
A guilty finding was entered to any charge or lessor included charge relating to any offense involving spouse or child abuse.	54	15
Cases Involving Not Guilty Findings		
A not guilty finding was entered to all charges and lessor included charges relating to all offenses involving spouse or child abuse. These also include any case in which a motion for a finding of not guilty was granted to all such charges.	5	3
Administrative Discharge		
The convening authority withdrew or the trial judge dismissed the charges as a result of an administrative elimination of the accused in lieu of court-martial (e.g., for enlisted soldiers, pursuant to Chapter 10, AR 600–200) following arraignment.	1	2
Charges Withdrawn		
The convening authority withdrew or the trial judge dismissed the charges as a result of an administrative elimination of the accused for some reason other than in lieu of court-martial following arraignment.	1	2
TOTAL	61	22

SEX OF THE ACCUSED				
Male	61		22	
Female	0		0	
TOTAL	61		22	
RELATIONSHIP OF ACCUSED TO CHILD ABUSE VICTIM				
Natural parent	20		11	
Step-parent	21		0	
Both natural parent and step-parent	1		0	
Spouse abuse not involving child abuse or unknown[3]	19		11	
TOTAL	61		11	
ALLEGED VICTIMS IN EACH CASE[6]				
Children under 10 years of age				
Female victim(s)				
1 victim in case	8		4	
2 victims in case	2		0	
Male victim(s)				
1 victim in case	1		5	
2 victims in case	1		0	
3 victims in case	0		1	
Both male and female victims				
2 victims in case	1		0	
Subtotal		13		10
Children 10 years of age or older, but under 18 years of age				
Female victim(s)				
1 victim in case	38		0	
2 victims in case	4		0	
Male victim(s)				
1 victim in case	0		2	
Both male and female victims				
2 victims in case	1		0	
Subtotal		43		2
Children both under and over 10 years of age, but under 18 years				
Female victim(s) only				
2 victims in case	1		0	
Female victim(s) over and male victim(s) under 10 years of age				
2 victims in case	1		0	
3 victims in case	1		0	
Subtotal		3		0
Female adult victims				
Alone without child victim(s)	—		9	
With female victim(s) under 10 years of age				
1 child victim	1		0	
2 child victims	1		0	
With both male and female victims under 10 years of age				
2 child victims	0		1	
Subtotal		2		10
TOTAL		61		22
TIME IN SERVICE OF ACCUSED[7]				
Less than 1 year	0		0	
1 year or more, but less than 5 years	5		10	
5 years or more, but less than 10 years	15		11	
10 years or more, but less than 15 years	19		1	
15 years or more, but less than 20 years	18		0	
20 years or more	4		0	
TOTAL	61		22	
COURT-MARTIAL SENTENCES AS APPROVED BY THE CONVENING AUTHORITY				
By Type of Discharge				
No discharge or dismissal	7		1	
Bad conduct discharge	9		9	
Dishonorable discharge	37		5	
Dismissal (officers only)	1		0	
TOTAL	54		15	
By Years of Confinement				
No Confinement	7		3	
Less than 1 year	2		5	
1 or more years, but less than 5 years	25		4	
5 or more years, but less than 10 years	9		1	
10 or more years	11		2	
TOTAL	54		15	
By Forfeiture of Pay or Allowances				
No forfeitures	21		7	
Partial forfeiture of pay	14		4	
Total forfeiture of pay and allowances	19		4	
TOTAL	54		15	
By Reduction in Grade				
To E1	46		15	
To E4	1		0	
To E5	1		0	
To E6	1		0	
No reduction in grade	1		0	
Reduction in grade not applicable	4		0	
TOTAL	54		15	

[1] Charges unrelated to child or spouse abuse did not include charges alleging a false official statement in violation of article 107, UCMJ or false swearing under article 134, UCMJ. Unrelated charges involved narcotic offenses, drunk driving, disobeying military orders and regulations, and assaults (and sexual offenses) involving victims other than the spouse, children, or step-children of an accused.

[2] Includes any case, regardless of plea or disposition, in which an accused was arraigned on one or more charges involving child sexual abuse. Some cases also had additional charges involving spouse abuse and other forms of child abuse, as well as charges unrelated to either spouse or child abuse.

[3] Unknown means that there is no entry or record contained in the Army Central Registry on this matter.

[4] No overseas cases outside of Europe were reported.

[5] The cases not resulting in a conviction are broken down by offense, type and age of victim, and disposition as follows:

Child Abuse	Male Victim	Under 10 Years	Not Guilty	2
Child Sexual Abuse	Female Victim	Over 10 Years	Not Guilty	3
			Admin Disch	1
		Under 10 Years	Not Guilty	1
			Admin Disch	1
			Chgs Withdrn	1
Spouse Abuse	Female Adult		Not Guilty	2
			Admin Disch	1
			Chgs Withdrn	2
	TOTAL CASES			14

[6] The breakdown does not include the age and genders of child victims who were not dependents of the accused since such offenses are outside the

definition of child abuse under the Army Family Advocacy Program. These offenses would be among those classified as charges unrelated child or spouse abuse.

[7] The time in service reflects the period of active duty service between the accused's basic active service date (BASD) and the date that the court-martial convening authority took action on the record of trial.

Appendix D

Offenses Charged Involving Crime in the Home

UCMJ Article	Offense	Type of Abuse Spouse	Child	Maximum Auth. Confinement in Years
118	Premeditated and unpremeditated murder	X	X	Life
119	Voluntary manslaughter	X	X	10
119	Involuntary manslaughter	X	X	3
124	Maiming	X	X	7
128	Simple Assault	X	X	1/4
128	Assault consummated by a battery	X	X	1/4
128	Aggravated Assault	X	X	8
134	Assault with intent to commit murder	X	X	20
134	Assault with intent to commit voluntary manslaughter	X	X	10
134	Negligent homicide	X	X	1
134	Pandering	X	X	5
134	Communicating a threat	X	X	3
120	Rape		X	Life
120	Carnal Knowledge		X	15
125	Sodomy [1]		X	20
128	Assault consummated by a battery upon a child under the age of 16 years		X	2
134	Indecent Assault		X	5
134	Assault with intent to commit rape		X	20
134	Assault with intent to commit sodomy [1]		X	10
134	Indecent act or liberties with a child		X	7
134	Indecent exposure		X	1/2
134	Indecent language		X	2
134	Indecent acts with another		X	5

[1] There were no reported sodomy cases where a spouse was the victim.

Misrepresentation Exception to the Federal Tort Claims Act

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Introduction

Determining the extent of the misrepresentation exception to the Federal Tort Claims Act (FTCA)[1] can be the cause of extensive and sometimes frustrating research with questionable results.[2] Justice Stewart faced similar difficulties in trying to define hard-core pornography: "I shall not today attempt further to define the kinds of material I understand to be embraced within that short-hand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."[3] Unfortunately, Justice Stewart's technique cannot be used here to define or clarify the misrepresentation exception.

The common law action for misrepresentation under state law has been merged to a great extent with other kinds of recognized misconduct that neither the courts nor legal writers have any occasion to regard as a separate basis of liability.[4] As a practical matter, the distinction between misrepresentation and these other forms of misconduct is important mainly in FTCA actions to determine the jurisdiction of federal courts. Thus, the question for examination is one strictly of federal law.[5] The legislative language establishing the exception is simple and appears straightforward.[6] The United States Supreme Court has addressed the application of this exception to liability on only two occasions.[7] While these decisions and those of other federal courts do establish some guidelines, there are still areas where the attorney is left to his or her own legal devices. This article seeks to identify the major judicial rules established by the courts and place some boundaries around the vague areas.

United States v. Neustadt

In 1961, the U.S. Supreme Court issued the *Neustadt* decision, its first opinion interpretating the misrepresentation exception to the FTCA.[8] In *Neustadt* the Court had to decide whether the government was liable to a purchaser who had paid $24,000.00 for a residential property after receiving a statement reporting the results of an inaccurate Federal Housing Administration (FHA) inspection and appraisal. The district court found the property's fair market value to be $16,000.00.[9] The Supreme Court held the government immune from liability because of the misrepresentation exception to the FTCA.

Several points in *Neustadt* are worth noting. First, the Court declares a broad interpretation for "misrepresentation"; the exception encompasses not only intentional false statements and actions by Government personnel, but negligent misrepresentation as well.[10] Second, the Court rejected the plaintiff's argument that the government owed the buyer a specific duty to conduct an adequate inspection and to render an accurate appraisal. This approach had been accepted by the Fourth Circuit and formed the basis for a negligence case separate from any action for misrepresentation. The Supreme Court realized the buyer would be aware of the results of the government's inspection and appraisal and might act upon this erroneous information to his economic disadvantage. Nevertheless, the purpose of the property's inspection and appraisal was not to aid the homeowner, but to protect the government's investment.[11] The Court found no cause of action that would not fall under the misrepresentation exception. Such a finding was saved for another day.

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[1] 28 U.S.C. §§ 2671–2680 (1982). The misrepresentation exception is at 28 U.S.C. § 2680(h) (1982).

[2] Difficulties in this area were recognized by the court in Krejci v. U.S. Army Material Development Readiness Command, 733 F.2d 1278, 1281 (7th Cir. 1984), when it stated that "with the emergence of a tort of negligent misrepresentation, the line between actionable and nonactionable misrepresentation blurred; in his treatise on federal claims, Jayson points out that misrepresentation "reaches a wide and ill-defined category of types of actions." L. Jayson, Handling Federal Tort Claims, § 260.05[1], at p. 13–69 (1987). Later, Jayson attempts to formulate a misrepresentation exception rule based on United States v. Neustadt, 366 U.S. 696 (1961), but he concludes that "numerous of the cases mentioned above do not adhere to this limitation on the scope of the exclusion." *Id.* § 260.05, at p. 13–97 and 1987 supp. at 150.

[3] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring opinion by Justice Stewart).

[4] *See* W. Prosser & W. Keeton, Torts 726 (5th ed. 1984).

[5] *See* United States v. Neustadt, 366 U.S. 696, 705–06 (1961); Ramirez v. United States, 567 F2d 854, 856 (9th Cir. 1977); Diaz Castro v. United States, 451 F. Supp. 959, 961 (D.P.R. 1978).

[6] 28 U.S.C. § 2680(h) (1982) provides: "The provisions of this chapter and Section 1346(b) of this title shall not apply to . . . (h) Any claim arising out of . . . misrepresentation. . . ."

[7] Block v. Neal, 460 U.S. 289 (1983); United States v. Neustadt, 366 U.S. 696 (1961).

[8] The Court accepted certiorari because of the importance of the issue and because the Fourth Circuit decision was in conflict with other circuits. *See Neustadt*, 366 U.S. at 701.

[9] *Id.* at 698–99.

[10] This point constitutes the key holding in *Neustadt*. The Court based its decision on a long string of earlier lower court decisions. *See* Jones v. United States, 207 F.2d 563 (2d Cir. 1953), cert. denied 347 U.S. 921, 74 S.Ct. 518, 98 L.Ed. 1075, reh. denied 347 U.S. 940, 74 S.Ct. 627, 98 L.Ed. 1089; National Mfg. Co. v. United States, 210 F.2d 263, (8th Cir. 1954) cert. denied 347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. 1108, Clark v. United States, 218 F.2d 446 (9th Cir. 1954); Miller Harness Co. v. United States, 241 F.2d 781 (2d Cir. 1957); Anglo-American & Overseas Corp. v. United States, 242 F.2d 236 (2d Cir. 1957); Hall v. United States, 247 F.2d 69 (10th Cir. 1959); Social Security Administration Baltimore Federal Credit Union v. United States, 138 F. Supp. 639 (D. Md. 1956); and United States v. Van Meter, 149 F. Supp. 493 (N.D. Cal. 1957).

[11] 366 U.S. at 709. Rather than squarely addressing whether the government owed a duty to the plaintiff to conduct inspections and appraisals in a nonnegligent manner, the court took a backhanded technique to reach its decision. After examining the National Housing Act, it stated that nothing existed in the legislative history to indicate Congress intended to limit or suspend the application of the misrepresentation exception.

Finally, the last footnote to the decision has left considerable confusion. The impact *Neustadt* might have on the Court's previous decision in *Indian Towing Co. v. United States*,[12] where the issue of misrepresentation was not addressed, concerned the Court. In *Neustadt*, the Court recognized that "misrepresentation" in the generic sense existed in the *Indian Towing* case. But it stated that the *Indian Towing* claim did not "arise out of . . . misrepresentation, any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal." Citing the work of Dean Prosser, the Court noted that many familiar forms of negligent conduct may be said to involve an element of "misrepresentation," in the generic sense of that word, but—

> "so far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit, and has been confined very largely to the invasion of interests of a financial or commercial character, in the course of business dealings."[13]

In its use of this footnote to distinguish its decision in *Neustadt* from *Indian Towing*, the Court laid the groundwork for confusion and considerable future litigation. One issue is whether misrepresentation exists merely as a part of overall government negligence, or whether the claim arises only from the misrepresentation. A second issue is created from Dean Prosser's words associating misrepresentation with interests of a financial or commercial character in the course of business dealings. Is the exception to government liability limited to misrepresentation in the course of business dealings? These were problems created, not answered, by the *Neustadt* Court.

Lower Court Decisions Cited by The Supreme Court

While the Supreme Court's use of lower court decisions in *Neustadt* was principally to incorporate negligent acts within the scope of the misrepresentation exception, these cases can serve as illustrations of decisions that have implied Supreme Court approval. The following cases should be useful as precedent in similar situations.

In the leading case of *Jones v. United States*,[14] plaintiff requested the U. S. Geological Survey to make an estimate of the oil-producing capacity of a certain portion of land in Wyoming.[15] In reliance upon an erroneous estimate, plaintiff sold securities representing oil and gas rights for $1.72, which was far less than their actual value of $5.16. Plaintiff's action for negligence was barred by the misrepresentation exception.

In *National Manufacturing Co. v. United States*,[16] landowners sued for damages to their businesses from flood waters, claiming they had been lulled into a false sense of security by negligently prepared and erroneous weather and flood reports issued by government agents. The court held the misrepresentation exception included affirmative acts of government agents in issuing incorrect information and in negligently assuring the claimants that the river would not overflow. Likewise, the misrepresentation exception was applied in *Clark v. United States*,[17] where housing authorities made statements assuring tenants that, barring unforeseen developments, the housing project was safe from flood waters of the Columbia River (which later destroyed the project).

Turning from government predictions of various elements of nature, we now consider the business activities illustrated by *Miller Harness Co. v. United States*.[18] Plaintiff alleged government agents made false statements to them concerning surplus property they proposed to buy. Upon receipt of the property, some items were not included.[19] The court pointed out that "no amount of characterization in the complaint can alter the fact that the case is solidly set upon a charge of innocent or willful misrepresentation."[20]

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[12] Indian Towing Company v. United States, 350 U.S. 61 (1955). Here, the Coast Guard was alleged to have caused damage to plaintiff's vessel by permitting the beacon of a lighthouse operated by it on an island to become extinguished and by neither repairing it nor by giving warning that it was not functioning. The government claimed that the FTCA did not provide a cause of action because the Coast Guard's lighthouse responsibilities were so uniquely governmental in nature that the United States could not be liable "in the same manner and to the same extent as a private individual under like circumstances." *See* 28 U.S.C. § 2674 (1982). In a five-to-four decision, the court rejected the government's claim and refused to rest government liability on a distinction between governmental and nongovernmental functions such as exists in the laws concerning liability for municipal corporations. The *Neustadt* court realized that it might be argued that the lack of an accurate signal provided a misrepresentation of the correct navigational conditions prevailing at the time of the accident. If accepted, this argument would preclude government liability because of the misrepresentation exception to the FTCA.

[13] 366 U.S. at 711.

[14] 207 F.2d 563 (2d Cir. 1953), *cert. denied* 347 U.S. 921 (1954).

[15] The court noted that oil-producing capacity estimates could vary by about 20%, but in this case the estimate was off some 300%. Further, all the necessary data was available to the Government agents at the time the false report was made.

[16] 210 F.2d 263 (8th Cir.), *cert. denied*, 347 U.S. 1967 (1954). As to misrepresentation, the court said the intent of this exception to the FTCA is to remove those cases where mere "talk" or failure to "talk" on the part of a government employee is asserted as the proximate cause of damage sought to be recovered from the United States. The court also noted that recovery in this case also was barred by the discretionary function exclusion to the FTCA and by the provisions of the Mississippi Flood Control Act.

[17] 218 F.2d 446 (9th Cir. 1954); *see also* Baroni v. United States, 662 F.2d 287 (5th Cir. 1981) (federal agency negligently miscalculated the predicted 50-year flood height when approving housing development plans for FHA and VA guaranteed loans; claims by ultimate purchasers held barred by misrepresentation exclusion); Schinmann v. United States, 618 F. Supp. 1030 (ED. Wash. 1985) (users of irrigation system altered their farm operations in reliance upon gratuitous, negligently prepared, and erroneous water supply forecasts of the Bureau of Reclamation. Misrepresentation and discretionary function exclusions barred plaintiff's action); Bartie v. United States, 216 F. Supp. 10 (W.D. La. 1963), *aff'd*, 326 F.2d 754, 5th Cir.), *cert. denied*, 379 U.S. 852 (1964) (U.S. Weather Bureau allegedly failed to provide adequate warning regarding the nature of a hurricane that was the cause of death. The Court held the claims arose from misrepresentation and were, therefore, barred by FTCA exception.).

[18] 241 F.2d 781 (2d Cir. 1957).

[19] The buyer was told that "sets" of cavalry saddle parts included stirrup irons and stirrup straps which, in fact, were not included in the sale.

[20] A different result was reached in Brown v. United States, 193 F. Supp. 692 (N.D. Fla. 1961), where surplus military bomb casings were sold without deactivating and removing the explosive material as certified by Government sales agents. The court recognized the existence of misrepresentation, but held the claim for injury when the bomb exploded was also based on the overall operational negligence of the government in preparing the surplus property for sale. The claim was not barred by the exception.

Neustadt cited two other cases involving negligent inspection and reporting by Government agents. *Anglo-American & Overseas Corp. v. United States*[21] involved tomato paste that plaintiff, an importer, had contracted to sell to the government. The contract required the paste to satisfy standards of the Food and Drug Administration. The Food and Drug Administration agents inspected and sampled the paste and then issued "release notices" notifying Customs officials that the paste could enter the country. After claimant accepted delivery and transferred the goods to the government, another inspection was conducted. The paste was determined to be below standard and ordered destroyed. Clearly, plaintiff relied upon the representations of the "release notices" when delivery was accepted. This was a misrepresentation and barred FTCA action. *Hall v. United States*[22] is similar in that Department of Agriculture inspectors testing livestock for brucellosis reported claimant's herd as infected with the disease. The cattle were quarantined and later sold at reduced prices. Claimant sued when he learned the cattle were not diseased. The court held plaintiff's loss was due to his reliance upon the negligent misrepresentation that his cattle were diseased. The negligent inspection caused him no harm; it was the report upon which he relied.[23]

In another pre-*Neustadt* case, the plaintiff alleged the government falsely implied the financial soundness of a credit union. The Bureau of Credit Unions falsely represented in a certificate concerning plaintiff credit union that generally accepted auditing standards had been followed and tests of the accounting records had been made.[24] The credit union thereafter brought an action against the United States to recover funds lost due to embezzlement by its office manager. The court held that the credit union's claim was based upon losses sustained due to their reliance upon the certificate. This claim was barred by the misrepresentation exception.[25]

Finally, the misrepresentation exception was held applicable even in counterclaims.[26] The United States brought an action against defendant for trespass and the wrongful taking of timber from government land. Defendant's counterclaim alleged the taking of timber was in reliance upon willful and negligent misrepresentations by government employees. The claim was denied even for the purposes of defeating or diminishing the government's recovery.[27]

In each of the above cases, the plaintiffs relied upon certain inaccurate statements or actions of various federal agents. Due to these misrepresentations by the Federal agents, each plaintiff suffered damages. Each case represents a classic example for application of the misrepresentation exception; whether the inaccuracies result from willful or from negligent conduct. One who relies upon government predictions of weather,[28] of oil-producing capacity of land, flood potential of land, and future water supply must accept this information at his own risk. Likewise, reliance upon Government inspection of food, cattle, hogs, and butchered meat are normally outside the scope of liability. Creation of false impressions of economic stability for banks, credit unions, or warehouses by federal agents also fall within the misrepresentation exception. Notwithstanding the foregoing problems, a plaintiff can still prevail if he is able to show that, apart from any misrepresentation, there existed a duty and breach thereof resulting in damages. This breach of separate duty is something that must be developed out of the facts of each case and be based upon the law of each state.

No Requirement For Business Dealings

Since it quoted Prosser in footnote 26 of *Neustadt*, the Supreme Court has remained silent concerning the need for misrepresentation to arise from injury to interests of a financial or commercial character, in the course of business dealings. Decisions of lower courts, with many exceptions,

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[21] Anglo-American & Overseas Corp. v. United States, 242 F.2d 236 (2d Cir. 1957).

[22] Hall v. United States, 274 F.2d 69 (10th Cir. 1959).

[23] *See also* Rey v. United States, 484 F.2d 45 (5th Cir. 1973) where federal agents said plaintiff's hogs had cholera. The herd was treated with a live virus and many died unnecessarily. Citing Hall v. United States, the court ruled the action was barred by misrepresentation exception. *But see* Ware v. United States, 626 F.2d 1278 (5th Cir. 1980), where 243 of a farmer's cattle were misdiagnosed as tubercular. Government agents destroyed the cattle. While there were clear statements of misrepresentation, the plaintiff did not rely to his detriment upon them. Rather, the government directly destroyed his cattle due to its own negligence. The *Ware* court reaffirmed but distinguished *Hall* and *Rey*. Likewise, in National Carriers, Inc. v. United States, 755 F.2d 675 (8th Cir. 1985), federal inspectors told a salvage crew they did not have to separate beef quarters exposed to ditch water from those not exposed. The court recognized this as misrepresentation, but allowed the claim to go forward because of the negligence of the inspector, who was obligated by regulations to separate and tag contaminated quarters.

[24] Social Security Administration Baltimore Federal Credit Union v. United States, 138 F. Supp. 639 (D. Md. 1956).

[25] *See also* First State Bank of Hudson County v. United States, 471 F. Supp. 33 (D. N.J. 1978), where the Federal Deposit Insurance Corporation allegedly neglected to take appropriate steps with respect to the conduct of the bank manager, and thereby, falsely misled the bank's board to believe that exceptions in an earlier report by the Corporation had been satisfied. Any cause of action was barred due to misrepresentation whether actual or implied. In Preston v. United States, 596 F.2d 232 (7th Cir.), *cert. denied*, 444 U.S. 915, (1979), plaintiff alleged an implied misrepresentation upon which reliance was placed in making business decisions. Plaintiff farmers argued that the Government agencies' audit of a grain warehouse created an aura that the warehouse was financially safe, and they relied to their detriment on this apparent Government approval, and deposited their grain therein where it was subsequently lost because of warehouse bankruptcy. Action was based on misrepresentation and barred.

[26] United States v. Van Meter, 149 F.Supp. 493 (N.D. Cal. 1957); *see also* United States v. Silverton, 200 F.2d 824 (1st Cir. 1952); United States v. Gill, 156 F. Supp. 955 (W.D. Pa. 1957).

[27] If the defendant had alleged his complaint in the form of an affirmative defense based on consent rather than a counterclaim, the court might have reached a different result.

[28] *But see* Ingham v. Eastern Air Lines, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967). In *Ingham*, the air traffic controller gave incorrect information concerning existing weather conditions. The court found these facts closer to *Indian Towing* than *Neustadt*. This was not a typical weather prediction case. It was a failure to report the known facts concerning visibility. To hold this excluded as misrepresentation would virtually exclude all liability where a communication is involved. The court held the negligence was operational in nature, and thus, actionable under the FTCA. 373 F.2d at 239.

seem either to ignore the comment or state that the exception is applicable to personal injuries or property damages outside the commercial area.[29]

Examining this problem in retrospect, it does not appear the *Neustadt* court intended the Prosser comment on "business dealings" to constitute a jurisprudential rule in applying the misrepresentation exception. As the law of negligence developed, most causes of action were based upon conduct that the courts recognized as negligence. The conduct may very well include misrepresentation, such as an incorrect turn signal in a traffic accident case. This "generic" misrepresentation, however, does not form the basis of liability; rather the courts have recognized a cause of action based upon negligent operation of a vehicle. Without this recognized cause of action, a plaintiff would only have the "misrepresentation" complaint.

This can best be understood in an historical context. There is no valid reason a plaintiff may not file an action alleging a driver's negligent misrepresentation by giving a wrong turn signal and causing an accident. As automotive law developed, however, the courts allowed a special and more direct action of negligent control of an automobile. The plaintiff listed each and every act of the defendant (including misrepresentation) that caused the accident. In essence, plaintiffs alleged a violation of the rules of the road requiring control of one's vehicle and the giving of certain signals for the benefit of other drivers. The giving of an incorrect signal was misrepresentation and caused the accident, but it also violated the recognized rules of the road. The breach of this separate duty allowed an action in negligence separate from the action in misrepresentation. This development in auto negligence is mirrored in other areas of negligence law. Therefore, only causes of action that were brought and based solely on misrepresentation were those without a separately recognized remedy. Most of these cases fell within the commercial area. This is what Prosser was saying when quoted by the *Neustadt* court. This action has been confined "very largely" to business dealings. It should not, and courts have not limited the application of a cause of action based solely on misrepresentation to business transactions. Even in *Neustadt*, many of the cases cited with approval included other than business considerations, for example, personal injury.

Thus, if any rule can be derived from this footnote, it is that most causes of action based strictly on misrepresentation and no other legal basis will arise in cases of a financial or commercial character in the course of business dealings. When Prosser made this observation in 1941, the legal maxim of "caveat emptor" was a very strong force controlling individual business relations. Realizing the amount of time Congress took in considering the FTCA,[30] the exception must have been intended to keep sovereign immunity intact in those areas where no separately recognized cause of action existed. Most of these excepted cases involved business dealings, where "caveat emptor" should prevail. Since Neustadt was decided in 1961, American law has witnessed the advent of consumer protection, with both state and federal statutory protection for individuals in various areas of the marketplace. Because of these developments, the red flag of caution isolating misrepresentation to the commercial area is no longer valid. The commercial nature of the action is not a legal test in any respect for application of the exception. It may, however, cause a court to examine the complaint with greater care to determine the true nature and basis of the action.[31]

Block v. Neal

Block v. Neal[32] is the most recent Supreme Court case to examine misrepresentation. In circumstances surprisingly similar to *Neustadt*, the Court distinguished *Neustadt* and ruled that the misrepresentation exception did not apply. The plaintiff obtained a loan from the Farmers Home Administration (FmHA)[33] for the construction of a home. Plaintiff then entered into a contract with Home Marketing for the construction of the home, which was to conform to approved FmHA plans. The contract also granted FmHA the right to inspect and test all materials and workmanship, and reject any that were defective. Accordingly, a Government agent conducted three inspections; there were no adverse comments. Upon completion of the home, FmHA issued a final report indicating the construction complied with the drawings and specifications previously approved. Upon occupying the home, plaintiff discovered numerous defects and deviations from the plans. Both the contractor and FmHA refused to correct the construction defects, and the plaintiff filed an FTCA claim.

The district court dismissed the claim against the United States for failure to state a claim upon which relief could be granted. Adopting the reasoning set forth in *Neustadt*, the court concluded that the rules requiring FmHA officials to ensure that the builder adhered to the terms of its construction contract were intended solely to protect the government's security interest, and were not intended to make FmHA warrant the quality of construction for the

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[29] In his treatise, Professor Jayson examined numerous cases and finally concluded that many do not adhere to the business requirement scope for the exclusion. *See supra* note 2. In Lloyd v. Cessna Aircraft Co, 429 F.Supp. 181 (E.D. Tenn. 1977) the court said it was unaware of any congressional indication to limit the misrepresentation exception to cases alleging financial or commercial loss and concluded that recovery for personal injury, wrongful death or property damage was also barred. *But see* Kohn v. United States, 680 F.2d 922, 926 (2d Cir. 1982); Allen v. United States, 527 F. Supp. 476 (D. Utah 1981). Likewise, in General Public Utilities Corp. v. United States, 551 F. Supp. 521, 527–529 (E.D. Pa. 1982), *rev'd on other grounds*, 745 F.2d 239 (3d Cir. 1984), which involved the Three Mile Island incident, the court stated: "[M]ost courts continue to hold that the misrepresentation bar goes "most often" to cases involving business transactions." In *Ingham*, 373 F.2d at 239, the court used the lack of business dealings to compare its case with the facts of *Indian Towing*.

[30] The FTCA was under Congressional consideration for some 28 years. *See Neustadt*, 366 U.S. at 707.

[31] Courts have stated their obligation to look beyond the words of the complaint and make their own determination concerning the true basis for the cause of action. *See* Bor-Son Bldg. Corp. v. Heller, 572 F.2d 174 (8th Cir. 1978);

[32] 460 U.S. 289 (1983).

[33] The Secretary of Agriculture was authorized by the Housing Act of 1949 to extend financial and technical assistance through the Farmers Home Administration (FmHA) to low-income rural residents seeking to obtain housing.

benefit of those receiving rural assistance loans.[34] While the court of appeals sustained the district court's reasoning that no contractual obligation existed on the part of FmHA to provide technical assistance, supervise construction, or inspect,[35] it did find a breach of duty under Section 323 of the Restatement (Second) of Torts. The court stated "that one who undertakes to act, even though gratuitously, is required to act carefully and with the exercise of due care and will be liable for injuries proximately caused by failure to use such care."[36] The court distinguished *Neustadt*, in that Neal's claim was based on the FmHA's failure to use due care in a voluntary undertaking, i.e., inspection and supervision of the construction of her house.[37] Given the purpose of the statute and plaintiff's particular circumstances, the court of appeals stated it was the intent of Congress that plaintiff was to benefit from the inspection and technical assistance offered by FmHA.[38] Thus, whereas the claim in *Neustadt* was based only upon misrepresentation of the property value, the claim here was based on the negligent performance of an operational task.[39]

The Supreme Court essentially adopted the Sixth Circuit's opinion.[40] In further explanation for the decision, Justice Marshall pointed out that but for the misinformation no injury was suffered in *Neustadt*. In *Neal*, however, the misstatements were not essential to plaintiff's negligence claim. Both claims involved misrepresentation. *Neustadt*, however, is based solely on the negligent statements of the FHA, while Neal's action is founded on a separate breach of duty: the FmHA's negligence in supervising the construction of her home. That she was later told her home passed the FmHA's standards is irrelevant to her action.

After the *Neal* decision, the FmHA revised its regulations to state specifically that any inspection or supervision of construction undertaken by FmHA was strictly for government benefit and not that of the purchaser. In light of this rule change, the Sixth Circuit changed its opinion concerning a gratuitous undertaking. Their recent opinion in *Moody v. United States*[41] is based on the reasoning of *Neustadt* rather than the *Neal* decision.

Operational Negligence v. Misrepresentation

There may be instances when the negligent action is some form of communication. It may not be possible to distinguish the generic misrepresentation from the conduct forming the basis for the action in negligence. It was for this reason the Supreme Court felt compelled to discuss *Indian Towing* in footnote 26 of *Neustadt*. If the "generic" misrepresentation is also recognized as a negligence cause of action, the courts usually refer to the conduct as "operational negligence." This is similar to the incorrect turn signal previously discussed. With the advent of "negligent misrepresentation," there are many cases where misrepresentation will exist, but the exception will not apply. The following is an effort to catalog and comment on some of those cases in light of the above rules.

In medical malpractice involving negligent diagnosis, the courts have acknowledged the existence of misrepresentation, but allow claims against the Government based on a duty to render proper care.[42] In *Betesh v. United States*,[43] the court held as operational negligence a physician's failure to warn a patient of medical problems. The plaintiff was examined at an Armed Forces Entrance Examining Station and an abnormal x-ray prevented his induction. The doctor failed to inform him of the dangers this x-ray suggested. Six months later his condition was diagnosed as Hodgkins disease which, when discovered in time, can be treated with a 95–99% chance of success. The Government's argument that the medical failure was misrepresentation and excepted from the FTCA was ruled without merit.[44] In 1977, the Ninth Circuit, in *Ramirez v. United States*,[45] overruled its

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[34] The *Neustadt* court applied the same reasoning:

> [I]t was repeatedly emphasized that the primary and predominant objective of the appraisal system was the protection of the Government and its insurance funds; that the mortgage insurance program was *not* designed to insure anything other than the repayment of loans. . . ; and that there is no legal relationship between the FHA and the individual mortgagor. Never once was it even intimated that, by an FHA appraisal, the Government would, in any sense, represent or guarantee to the purchaser that he was receiving a certain value for his money.

366 U.S. at 708–09.

[35] Neal v. Bergland, 646 F.2d 1178, 1181 (6th Cir. 1981).

[36] *Id.* at 1182. The Court of Appeals cited several instances illustrating this principle. Ingham v. Eastern Air Lines, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931, (1967) concerned negligent action in the operation of the federal air traffic control system, and *Indian Towing Co.* concerned negligence in the operation of maritime navigational aids.

[37] 646 F.2d at 1184.

[38] *Id.*

[39] *Id.* at 1183.

[40] 460 U.S. 289 (1983).

[41] 774 F.2d 150 (6th Cir. 1985), *cert. denied*, 107 S.Ct. 65 (1986). In this case, both plaintiffs obtained loans from the FmHA. In both instances, it is alleged FmHA supervision and inspections were negligent. Both homes were uninhabitable due primarily to faulty water drainage. The Government defended on the grounds that no duty was owed to plaintiffs concerning the inspections or supervisions of construction. This was specifically in accordance with the new rules for FmHA. Without a duty, there could be neither breach nor negligence. This was the same defense as in *Neustadt*. This time, the 6th Circuit accepted it the government's argument. The only thing left for the plaintiff was negligent misrepresentation, and the court applied the exception to liability. For a similar result involving FmHA, see Manstream v. United States Department of Agriculture, 649 F. Supp. 874 (M.D. Ala. 1986). *But see* Creasy v. United States, 645 F. Supp. 853 (W.D. Va. 1986) where the court applied the Virginia Good Samaritan doctrine, and found that FmHA did voluntarily assume a duty. Citing *Block v. Neal*, the *Creasy* court did not apply the misrepresentation exception.

[42] *See* Kilduff v. United States, 248 F. Supp. 310 (E.D. Va. 1960); Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962); Beech v. United States, 345 F.2d 872 (5th Cir. 1965); DeLange v. United States, 372 F.2d 134 (9th Cir. 1967); Wright v. Doe, 347 F. Supp. 833 (M.D. Fla. 1972); Green v. United States, 385 F. Supp. 641 (S.D. Cal. 1974); Diaz Castro v. United States, 451 F. Supp. 959 (D. P.R. 1978); and Herring v. Knab, 458 F. Supp. 359, 362 (S.D. Ohio 1978).

[43] 400 F. Supp. 238, 241 (D.D.C. 1974).

[44] *Id.; see* James v. United States, 483 F. Supp. 581 (N.D. Cal. 1980).

[45] 567 F.2d 854 (9th Cir. 1977).

earlier decision in *Hungerford v. United States,*[46] and held that a failure to properly advise a patient concerning the risks of surgery is not within the misrepresentation exception. The court noted that Congress specifically rejected an FTCA amendment to retain Government immunity in rendering medical treatment.[47] Thus, the court attributes a legislative intent to provide a remedy for negligent medical treatment. Proper diagnosis and correct advice to patients is just as much a part of good medicine as making correct turn signals is to driving or maintaining beacons is to navigation.[48] Negligent misrepresentation is secondary to an action for medical negligence, and therefore will not act as a bar.[49]

Likewise, air traffic controllers provide information for the direction and safety of aviation. Negligent communication of information may be a misrepresentation, but it is also recognized as operational negligence and will support an action under the FTCA.[50] In a sale of bomb casings, Government personnel failed to deactivate and remove explosive materials resulting in injury. The court[51] agreed there was an element of misrepresentation in that the Government misstated the nature of the property sold to plaintiff. However, liability was based upon failure to deactivate the bombs, and the misrepresentation was not allowed to defeat plaintiff's action. Similarly, the Government argued misrepresentation of safety conditions when Department of Agriculture agents fumigated a truck and left dangerous gas residue on the seat causing injury.[52] The court agreed with the existence of misrepresentation, but permitted the action on the basis of the negligent manner in which the agents permitted and directed the fumigation.

The foregoing cases illustrate the distinction in the *Neustadt* reference to *Indian Towing* and in *Block v. Neal* between misrepresentation as a cause of action that is excepted from Government liability under the FTCA and generic misrepresentation that can exist in an action involving operational negligence. In these illustrative cases, the courts recognized a cause of action in negligence other than mere misrepresentation.

There are instances where factual situations may be very similar, but due to recognized developments in the law of negligence, one action will be allowed by the court while another is barred. The agricultural inspection cases best illustrate this point. Notwithstanding the negligence of their inspections, tests, and reports as compared to their overall operations, the courts have consistently refused to recognize a cause of action.[53] Yet the misrepresentations of air traffic controllers in providing incorrect weather, light, and hazard information is recognized in negligence.[54]

The shifts in the development of negligence law and the misrepresentation exception can also be seen in *Block v. Neal*, where the Supreme Court recognized FmHA's breach of a gratuitious duty. Now, FmHA's new regulations declare their inspection and reporting activities to be solely for the Government's benefit. Does this reverse *Block v. Neal*? In view of the Sixth Circuit action in *Moody* and the *Manstream* decision,[55] the basis for the Supreme Court's decision has been removed. Just as in *Neustadt*, there is now no recognized duty toward the plaintiff.

Conclusion

In conclusion, I suggest that for this subject *Neustadt* is the cornerstone of jurisprudential rules. Its lessons remain valid to this day. First, misrepresentation encompasses intentional as well as negligent acts of federal employees. Second, the mere communication of false information may be misrepresentation in a generic sense, but if the claim is also based upon a recognized action in negligence, the exception will not bar the claim. Third, communications of a financial or commercial character in the course of business dealings are especially susceptible to misrepresentations, but an action against the Government will be allowed only if the claim is based upon some other recognized tort obligation.

While the application of the misrepresentation exception is a question of federal law, the ability to avoid this exception to government liability rests in recognized causes of action under substantive state law. The existence of misrepresentation will not nullify an otherwise valid cause of action under the FTCA.

Finally, the search for a clear and understandable definition must await some future Supreme Court decision or congressional action. In the meantime, Army lawyers must be prepared to deal with the misrepresentation exception in handling claims against the government. It has arisen in a

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[46] 307 F.2d 99 (9th Cir. 1962).

[47] 567 F.2d at 856.

[48] The court cited *Neustadt* as the basis for its holding.

[49] *See* Block v. Neal, 460 U.S. 289 (1983). The existence of misrepresentation will not bar an action if a negligence basis exists.

[50] *See* Ingham v. Eastern Air Lines, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967); Sullivan v. United States, 299 F. Supp. 621 (N.D. Ala.), *aff'd.*, 411 F.2d 794 (5th Cir. 1968), where a Government agent published and distributed a misleading airport light chart resulting in a plane crash. The court held such preparation and circulation of information to be an operational task and a cause of action would lie in negligence. *See also* United Air Lines v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed sub nom.* United Air Lines v. Wiener, 379 U.S. 951 (1964), where failure to warn civilian aviation of hazards of military flight training was negligent performance of operational tasks.

[51] *See* Brown v. United States, 193 F. Supp. 692 (N.D. Fla. 1961).

[52] Jordan v. United States, 294 F. Supp. 204 (S.D. Ga. 1968).

[53] *See generally* Rey v. United States, 484 F.2d 45 (5th Cir. 1973); Hall v. United States, 274 F.2d 69 (10th Cir. 1959).

[54] See generally, Ingham v. Eastern Air Lines, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967); *Sullivan; Weiner.*

[55] *See supra* note 41.

number of cases involving military-related fact situations.[56] I wish we could be as confident in recognizing misrepresentation as Justice Stewart was with pornography. Such is not to be, however.

[56] Some possible situations that may arise in military practice are found and discussed in the following cases: Moessmer v. United States, 760 F.2d 236 (8th Cir. 1985) (improper personnel record-keeping and reporting); Kohn v. United States, 680 F.2d 922 (2d Cir. 1982) (shooting of a soldier by a fellow soldier); Fitch v. United States, 513 F.2d 1013 (6th Cir. 1975) (wrongful induction into the armed forces); Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974) (improper record-keeping and reporting); Reamer v. United States, 459 F.2d 709 (4th Cir. 1972) (misstatements by recruiter); Vogelaar v. United States, 665 F. Supp. 1295 (E.D. Mich. 1987) (failure to timely and correctly identify Vietnam soldier's remains and correctly list the deceased's military status at the time of death); Sheridan v. United States, 542 F. Supp. 1243 (E.D.N.Y. 1982) (same).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

"SECRET TRIALS": A Defense Perspective

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I. INTRODUCTION

A dilemma exists when the criminal trial of an accused soldier will involve the revelation of classified information.[1] The sensitive nature of the evidence produced in such cases often causes a struggle between the accused's right to a public trial and the need to protect the country's national security interests. There has been a recent increase in cases involving classified matter where defense counsel are confronted with the probability of a closed courtroom. Defense counsel should ponder whether the simple utilization of the terms "security" or "military necessity" can be the talisman in whose presence the protections of the sixth amendment and its guarantees to a public trial must vanish.[2] This article will discuss the national security exception to the sixth amendment right to public trial. Specifically, it will address the historical significance of the constitutional right to public trial and how the right has been eroded by case law and military procedures prescribed by Military Rule of Evidence (MRE) 505.

II. RIGHT TO PUBLIC TRIAL

A fundamental aspect of our judicial system is that it is conducted in public.[3] This Anglo-American tradition is embodied in the public trial clause of the sixth amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial".[4] In addition to the accused's sixth amendment right to public trial, the press and general public have a right of access to criminal proceedings pursuant to the first amendment.[5] These rights encompass practically all phases of the trial process, and extend to trial by court-martial.[6]

A. History and Public Policy

The origin of the accused's right to public trial is deeply rooted in our English common law heritage.[7] This right derived from the public's learned distrust of secret inquisitions and trials. The public trial is such a basic element of our judicial system that, when the Supreme Court decided *In re Oliver*[8] in 1948, it was "unable to find a single instance of a criminal trial conducted *in camera* in any federal, state, or municipal court during the history of this

[1] Military Rule of Evidence 505(b)(1) defines "classified information" as "any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. 2014(y)."

[2] United States v. Grunden, 2 M.J. 116 (C.M.A. 1977).

[3] *In re* Oliver, 333 U.S. 257 (1948).

[4] U.S. Const. amend. VI.

[5] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

[6] *See* Press Enterprise Co. v. Superior Court of California, 422 U.S. 501 (1984) (preliminary hearing); Waller v. Georgia, 467 U.S. 39 (1984) (suppression hearing); Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 569 (state criminal trial; United States v. Hershey, 20 M.J. 433 (C.M.A. 1985) (court-martial).

[7] *In re Oliver*, 333 U.S. at 257, 266.

[8] *Id.* at 258.

country."[9] Nor could the Court find any record "of even one such secret criminal trial in England since abolition of the Court of the Star Chamber in 1641."[10] Publicity has represented the "soul of justice" in our judicial system.[11]

Several public policies underlie the sixth amendment's guarantee of a public trial. The open nature of the judicial system is perceived as an effective check against judicial and prosecutorial abuse. A public trial is believed to effect a fair trial by ensuring that all parties are dutiful, by encouraging witnesses to come forward, and by discouraging perjury.[12] Stated plainly, "the public trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses and jurors will perform their perspective functions more responsibly in an open court than in secret proceedings.[13] Publicity is essential to the criminal defendant because it safeguards the integrity of our courts. Open courtrooms are of fundamental interest to the public so that there will exist free debate on the law and its application. Public confidence in the rule of law must be preserved. As one court commented, "[S]ecret hearings, though they may be fair in reality, are suspect by nature."[14]

B. Prejudice Per Se

Although the societal value of the public trial is easily described in the abstract, it would be difficult, if not impossible, for a defendant to point to any definite injury if he were unconstitutionally denied the right to a public trial.[15] Requiring the defendant to show that he has been "deprived of the presence, aid, or counsel of any person whose presence might have been of advantage to him"[16] would render the right to a public trial illusory. Moreover, the burden of proving perjury, misconduct, or secret bias would weigh too heavily on this constitutional safeguard. As a result, the Supreme Court has adopted the "consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public trial guarantee".[17] Thus, when the public has been improperly excluded, prejudice is presumed and more than that need not appear.[18]

III. LIMITATIONS ON THE RIGHT OF PUBLIC TRIAL

The tradition of openness in the judicial system has been the source of many difficult issues before the United States Supreme Court. The right to public trial, though constitutional in stature, is not absolute. Thus, discrepancies appear in determining the extent to which the right may be limited.

The public trial issue has been characterized in both first and sixth amendment terms and thus has been approached from two viewpoints. First, the public and press argue that they have the right of access to criminal trials. Secondly, criminal defendants have challenged convictions obtained in "secret trials". The subject of this article is the defendant's right to public trial. This must include the following discussion of the public's right to access, however.

A. The Public Access Standard

The sixth amendment issue of whether a criminal proceeding may be closed over the objection of the defendant has been evaluated by applying the first amendment analysis developed in the right of access cases. In *Richmond Newspapers, Inc. v. Virginia,*[19] where an entire murder trial was closed to the public, the Supreme Court held that the right of the public and the press to attend criminal trials is implicit in the guarantees of the first amendment.[20] The Court also recognized, however, that this first amendment right is not absolute. It held the trial must be open to both the public and the press, absent a finding by the trial judge of an overriding interest in protecting the defendant's superior right to a fair trial.[21] The Court did not further identify what "overriding interests" would justify closure, or address the standards by which to measure closure.

The first time a majority established a standard for closure requests was in *Globe Newspaper Co. v. Superior Court for the County of Norfolk,*[22] where the Court considered a Massachusetts statute that required mandatory exclusion of the public and press from trials of sex offenses involving victims under eighteen years of age. The Court found that "the State's justification in denying access [to a criminal trial] must be a weighty one," and where "the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[23] The Court struck down the mandatory rule of exclusion in favor of a case-by-case determination of whether secrecy was appropriate.

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[9] *Id.* at 257.

[10] *Id.* at 266 n.12 (cases in courts-martial may be an exception).

[11] Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (citing J. Bentham, A Treatise on Judicial Evidence 67 (1825)).

[12] *Waller,* 467 U.S. at 46.

[13] Estes v. Texas, 381 U.S. 532, 588 (1965).

[14] United States v. Cianfrani, 573 F.2d 835, 851 (3d Cir. 1978).

[15] Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944).

[16] *See* Reagan v. United States, 202 Fed. 488, 490 (9th Cir. 1913); People v. Byrnes, 84 Cal. App. 72, 190 P.2d 290, 293, *cert. denied,* 335 U.S. 847 (1948).

[17] *Waller,* 467 U.S. at 46.

[18] *Tanksley,* 145 F.2d at 59.

[19] *Richmond,* 448 U.S. at 571.

[20] *Id.* at 580.

[21] *Id.* at 581.

[22] Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596 (1982).

[23] *Id.* at 606, 607.

In *Press Enterprise Co. v. Superior Court of California,*[24] the Supreme Court developed a test for determining when trials may be closed to the public. In that case, the Court reviewed the highly publicized trial of a black defendant for the rape and murder of a white teenager, and held that closure of individual voir dire violated the press's first amendment right of access to criminal proceedings. The Court determined that, to overcome the right of access and to close the criminal proceeding, "the party seeking closure must advance an overriding interest that is likely to be prejudiced; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate findings supporting the closure to aid in review."[25]

B. Application of the Public Access Standard

The limitations placed on the *public and press's* right of access to criminal proceedings spread for the first time to the *defendant's* right to public trial in *Waller v. Georgia.*[26] In that sixth amendment case, the Court applied the analysis it had developed in the first amendment right-to-access cases to determine whether a hearing on a motion to suppress evidence may be closed over the objection of the defendant. In a unanimous opinion, the Court held that the public trial right defined by the sixth amendment applies to a suppression hearing. The Court held for the first time that the defendant's right to a public trial under the sixth amendment is a limited right, capable of being overcome in precisely the same manner as the public's right to access. The Court asserted that "any closure of a suppression hearing *over the objections of the accused* must meet the tests set out in *Press-Enterprise* and its predecessors."[27] Thus, the Court limited the accused's public trial rights by applying the public access standard. This is a departure from the previous cases dealing with the rights of the accused, as distinct from the public, where the Court strictly required that proceedings be conducted in public.

Waller simply assumes, without analysis, that the accused's right to a public trial is no more extensive and no more constitutionally significant than the public's. But there exist good reasons why the accused's rights should be broader than the public's. First, the accused's rights are expressly protected by the language of the sixth amendment, not implied from its policy concerns. Second, the most important reason to recognize a limitation on public access is the need to protect the fair trial rights of the defendant. When it is the accused who demands a public trial, this rationalization is inapposite. Finally, all the policy reasons supporting a public right of access are heightened when it is the defendant who is seeking protection from the abuses of a secret trial.

Nevertheless, both the accused's express rights under the sixth amendment and the public's implied rights are qualified. The standard for overcoming both rights is set out in *Press-Enterprise*:

> [T]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[28]

There are numerous "higher values" which, in the proper circumstances, can justify closure. The Court has identified several: 1) the defendant's interest in a fair trial; 2) a juror's privacy interest in not having information revealed about him during *voir dire*; 3) the privacy interests of persons not before the court; 4) state law rules on admissibility of evidence; 5) the interests in protecting minor victims of sex crimes from further trauma and embarrassment; 6) the interest in encouraging victims of sex crimes to come forward and testify in a truthful and credible manner; and 7) the government's interest in inhibiting disclosure of sensitive information.[29] This list is not exhaustive. As delineated, the analysis in these cases has proceeded largely under the first amendment. Nevertheless, there can be little doubt that the explicit sixth amendment right of the accused to a public trial is no less protected than the implicit first amendment right of the public.[30]

IV. CLOSING THE COURT-MARTIAL

The right to a public trial in courts-martial is as full and complete as in civilian courts.[31] Likewise, the public's and press's first amendment right to access to criminal trials is equally applicable to courts-martial. Rule for Courts-Martial (RCM) 806(a) mandates that courts-martial shall be open to the public. This is not absolute, however, and the discussion to the rule provides for three specific exceptions to the public trial guarantee. First, a court-martial may be closed without the consent of the accused under Mil. R. Evid. 412(c), which provides for an in camera hearing on the admissibility of a sexual offense victim's past behavior. Second, the courtroom will also close its doors under Mil. R. Evid. 506(i) when government information detrimental to the public would be disclosed.

Lastly, Mil. R. Evid. 505(i) and (j) allow for the exclusion of the public when classified information will be disclosed. Although the presentation of classified or security matters did not develop as a historical exception to the guarantee to public trial, it has been questionably justified by case law and the procedures set out by Mil. R. Evid. 505(j).

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[24] *Press-Enterprise Co.*, 422 U.S. at 509.

[25] *Id.* at 509.

[26] *Waller*, 467 U.S. at 48.

[27] *Id.* at 48 (footnote omitted) (emphasis added).

[28] *Press-Enterprise Co.*, 422 U.S. at 824.

[29] Note, *Public Trials*, 8 Hamline L. Rev. 127 (1985).

[30] *Waller*, 467 U.S. at 48.

[31] *Grunden*, 2 M.J. at 120 & n.3.

A. The Constitutionality of MRE 505(j)

Military Rule of Evidence 505(j) limits the accused's right to a public trial in cases involving the disclosure of classified information. The rule provides in pertinent part: "[I]f counsel for all parties, the military judge, and the members have received appropriate security clearances, the military judge may exclude the public during that portion of the testimony of a witness that discloses classified information."

Thus, under Mil. R. Evid. 505, the military judge may exclude the public and press from a court-martial whenever classified information is discussed. If the entire court-martial involves classified information, Mil. R. Evid. 505 allows the military judge to close the entire proceeding. The rule is based on the Court of Military Appeals decision, *United States v. Grunden,*[32] and on a federal statute called the Classified Information Procedures Act (CIPA).[33] In *Grunden,* where the defense challenged the validity of closing the court-martial for security reasons,[34] an airman was convicted of attempted espionage and failure to report contact with individuals believed to be hostile intelligence agents.[35] The Court of Military Appeals held that the military judge's blanket exclusion of the public failed to satisfactorily balance the competing interests of government in protecting against divulgence of classified material against the accused's right to a public trial.[36] The court held the accused was improperly denied his right to a public trial.[37] The court decided that the military judge should employ a balancing test in cases involving the possible divulgence of classified material.[38] The first inquiry is whether the perceived need urged as grounds for excluding the public is of sufficient magnitude to outweigh the danger of a miscarriage of justice that may attend judicial proceedings carried out in even partial secrecy.[39] The prescribed procedures are uneven, however, because they always result in the closing of proceedings during the introduction of classified information.[40]

To close the court-martial, trial counsel has the initial burden of showing that the information to be presented in closed session has been properly classified by the appropriate authority in accordance with regulation.[41] The military judge does not conduct a de novo review of the classification decisions, but may only decide whether the determinations are arbitrary and capricious.[42] Once the military judge accepts the classification decision, the only remaining question is the "scope of exclusion of the public."[43] Although *Grunden* requires limiting closed sessions to those involving only classified matters,[44] the government will invariably prevail in closing at least part of the proceedings because all it need demonstrate is that the classification authority did not abuse its discretion (i.e. the classification was not arbitrary or capricious). The defense is in a poor position to show that information is classified improperly.[45]

The court of appeals states in *In re Washington Post Co.,*[46] "a blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse." Military Rule of Evidence 505 establishes an elaborate apparatus to deal with government claims that classified information is privileged. The rule purports to provide the military judge with alternatives and sanctions designed to ensure that the accused's right to a fair trial is not impaired due to the government's desire not to publicly disclose the classified information. Nevertheless, these protections vanish once the military judge rules that classified information will be admitted at trial, and opts to close the courtroom, an alternative that was not included in the federal statute upon which Military Rule of Evidence is based. The rules of evidence should not give the government control over closure of the court-martial through its control of the classification process. Yet, such is the obvious effect of Military Rule of Evidence 505 because the presentation of classified information at trial will always result in some degree of closure. Thus Military Rule of Evidence 505 is merely an attempt to control the amount of prejudice suffered by the accused, not a rule to eliminate it.

Military Rule of Evidence 505 (j) is also derived from CIPA. The analysis of Rule 505 states that the rule is a response to a litigation problem faced by the Department of Justice known as "graymail." The term "graymail" refers to the actions of a criminal defendant in seeking access to, revealing, or threatening to reveal classified information in

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[32] *Id.* at 119.

[33] H.R. 4745, 96th Cong., 2d Sess. (1979). This bill was introduced on 11 July 1979.

[34] Recent cases lacking a defense challenge to Mil. R. Evid. 505 include: United States v. Baba, 21 M.J. 76 (C.M.A. 1985) (conviction for wrongful communication of classified information to foreign agents); United States v. Baasel, 22 M.J. 505 (A.F.C.M.R. 1986) (security officer tried to introduce evidence of his classified duties related to compulsive gambling offenses); and United States v. Gaffney, 17 M.J. 565 (A.C.M.R. 1983) (conviction for gross negligence in losing classified information).

[35] *Grunden,* 2 M.J. at 119.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 121–22.

[39] *Id.* at 122.

[40] *Id.* at 122–24.

[41] *Id.* at 123.

[42] *Id.* at 123 n.14.

[43] *Id.* at 123.

[44] *Id.*

[45] Central Intelligence Agency v. Sims, 471 U.S. 159, 178 (1986).

[46] *In re* Washington Post Co., 807 F.2d 383, 392 (4th Cir. 1986).

connection with his defense.[47] The Classified Information Procedures Act was enacted to address the problem of "graymail".

The legislative history of the statute states that its purpose is to "provide pretrial procedures that will permit the trial judge to rule on questions of admissibility involving classified information before introduction of the evidence in open court."[48] If the court finds that the proffered evidence is relevant and material, the defendant can present that evidence to the jury in open court. This procedure allows the government to accurately assess, before trial, the potential for disclosure of classified information resulting from the planned prosecutions. In this way, the government can make an informed decision as to whether to proceed with the prosecution. It can accurately weigh the harm of disclosure against the need to prosecute.

Military Rule of Evidence 505(i), provides for *in camera* proceedings in cases involving classified information where the military judge shall determine whether classified information may be disclosed at a court-martial proceeding. According to this rule, if classified information is relevant and necessary to an element of the offense or a legally cognizable defense and is admissible in evidence, it is subject to disclosure. The rule is essentially identical to the federal statute, with one important exception. The Classified Information Procedures Act preserves the accused's right to a public trial even though the trial will involve classified information. Military Rule of Evidence 505(j), however, expressly allows the court-martial to be closed when classified information is disclosed. Had Congress decided that courts could be closed during the presentation of classified information, CIPA would have been unnecessary and the "graymail" problem would have been easily avoided. Thus, Mil. R. Evid. 505(i), which sets out complex procedures for determining whether classified information may be disclosed, serves no purpose when Mil. R. Evid. 505(j) allows the public to be excluded.

Military Rule of Evidence 505(j) allows the military judge and the government the unfettered discretion to suspend the public's first amendment and the accused's sixth amendment rights. Furthermore, Mil. R. Evid. 505(j) does not incorporate or even make mention of the *Press Enterprise* standard for closing the court to the public, which was later adopted by the Court of Military Appeals.[49] For these reasons, military defense counsel are advised to carefully consider the constitutionality of Mil. R. Evid. 505. When the government announces its intention to close a trial, defense counsel should be prepared to challenge the government, fully litigate the matter, and establish a record for appellate review. The argument is simple and was well-stated in *Grunden*: "[T]he simple utilization of the terms "security" or "military necessity" cannot be the talisman in whose presence the protections of the sixth amendment and its guarantees to a public trial must vanish."[50]

[47] *See* Eisenberg, *Graymail and Grayhairs: The Classified and Official Information Privileges Under the Military Rules of Evidence*, The Army Lawyer, Mar. 1981, at 10.

[48] Senate Rep. 96–823, 96th Cong., 2d Sess. 1–4 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4294.

[49] United States v. Hershey, 20 M.J. 433 (C.M.A. 1985).

[50] *Grunden* at 120.

DAD Notes

Sixth Amendment Renaissance—Hearsay and Confessions

The case of *United States v. Moreno*[1] illustrates the renewed importance of the sixth amendment to trial practice, for both issues of hearsay and confession.

The Sixth Amendment and Hearsay

Moreno was charged with committing consensual sodomy with his 14-year-old stepson. The government was left with a paper case when its chief witnesses became hostile to the prosecution and fled to Canada. Prior to fleeing the jurisdiction, the witnesses against Moreno recanted their allegations in a written affidavit and at a deposition hearing.

The Army Court of Military Review held the original allegations were admissible under the residual hearsay exception.[2] The court found the statements had specific indicia of reliability that gave the trier of fact a satisfactory basis for evaluating the truth of the out-of-court statements.[3] Their indicia tracked the findings of the military judge.[4] The Court did not address indicia of *unreliability*, specifically the recantations. Defense counsel should be prepared to respond to the government's use of *Moreno* to justify the admission of hearsay under similar circumstances.

With respect to the use of the hearsay statements and their admissibility under the residual hearsay exception, the issue is one of reliability. The Court of Military Appeals has

[1] 25 M.J. 523 (A.C.M.R.), *petition filed*, 25 M.J. 302 (C.M.A. 1987).

[2] Mil. R. Evid. 804(b)(5); *see also* Mil. R. Evid. 803 (24).

[3] 25 M.J. at 527.

[4] *Id.* at 527 n.6. In essence, the indicia the Army court found were that the declarants were eyewitnesses who depended upon the accused for support, their statements were written and sworn, the statements corroborated each other, and the statements were corroborated by the accused's confession. In spite of the court's criticism of the military judge for failure to make special findings, the Army Court's findings in footnote six were almost a repetition of the military judge's findings. *See* Record of trial at 277, 287, 302–03, 319–20.

indicated that the admissibility of hearsay is governed primarily by the Constitution and the sixth amendment.[5] Hearsay can be admitted without violating an accused's right to confrontation under the sixth amendment if the witness is unavailable and the statements bear adequate "indicia of reliability"[6] or "particularized guarantees of trustworthiness."[7]

Practitioners confronted with a citation to *Moreno* should be aware of several facts. First, the decision is being appealed.[8] Second, the opinion fails to address important case law of the United States Court of Military Appeals. Defense practitioners should argue that *United States v. Barror*[9] and *United States v. Codero*[10] govern the use of the residual hearsay exception. Merely because a statement is written, sworn, and made in close proximity to an event does not necessarily establish its reliability. If this were the case, "then virtually every statement to police will be admissible where the declarant is 'unavailable.'"[11]

Finally, the opinion fails to address facts that tend to establish that the out-of-court statements were *unreliable*, rather than reliable. In *United States v. Hines*,[12] Judge Cox carefully noted the finding of the court below that there had been no recantation of the out-of-court statement. In *United States v. Groves*,[13] the Court of Military Appeals apparently regarded the falsity of collateral facts as sufficient to render hearsay inadmissible. If false collateral facts can render hearsay inadmissible, a recantation declaring the entire document to be false should certainly have the same impact. In *United States v. Lockwood*,[14] the Air Force Court of Military Review has flatly concluded that recantation renders hearsay unreliable and inadmissible.

When resisting the use of the residual hearsay exception, defense practitioners should also track the language of *Barror*, and characterize the hearsay, if possible, as little more than the work product of police investigation.[15]

The Sixth Amendment and Confessions

In an unrelated development, the sixth amendment was critical to the admissibility of a confession in *Moreno*. Defense practitioners must be sensitive to the distinction between fifth and sixth amendment protection. The Court in *Moreno* did not address this distinction, and it was poorly litigated at trial.

In *Moreno*, the accused was questioned by an investigator for the State of Texas nine days after charges had been preferred. The Court based its decision primarily upon Article 31 and the fifth amendment as applied in *Miranda v. Arizona*.[16] The Court held the investigator was not an agent for the Army, so that Article 31 was not triggered,[17] and that her interrogation did not violate Moreno's rights under the fifth amendment.[18]

An accused's protection under the sixth amendment, however, is much broader than under the fifth amendment, or, in many cases, even under Article 31. To appreciate this distinction, defense counsel should take the time to carefully read *Michigan v. Jackson*.[19] The sixth amendment right to counsel attaches whenever *any* agent of the government questions an accused after the government has initiated formal proceedings against him or her; it does not require that the interrogation be custodial.[20] In the military, preferral of charges constitutes the initiation of formal proceedings and entitles an accused to the presence of counsel under the sixth amendment.[21] This sixth amendment right to counsel is absolute.[22] The Supreme Court will assume that an accused has demanded the assistance of counsel, indulging every reasonable presumption against waiver.[23] This contrasts sharply with the easily waived protection afforded by the fifth amendment.

Finally, the *Moreno* Court failed to acknowledge that is is irrelevant which representative of the government secures a confession from an accused once the sixth amendment right to counsel has attached.[24] Once formal proceedings have been initiated, an accused is protected from questioning by an agent of the State, irrespective of which

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[5] *See* United States v. Hines, 23 M.J. 125, 134 (C.M.A. 1986); *see also id.* at 136 n.14.

[6] Mancusi v. Stubbs, 408 U.S. 204, 213 (1972).

[7] Ohio v. Roberts, 448 U.S. 55, 56 (1980).

[8] The Supplement to Petition for Grant of Review was filed on 13 November 1987.

[9] 23 M.J. 370 (C.M.A. 1987).

[10] 22 M.J. 216 (C.M.A. 1986).

[11] 23 M.J. at 372.

[12] 23 M.J. at 136; *id.* at 127 n.4. The witnesses in *Hines* did make prior inconsistent statements. *Id.* at 137. After their original denial that a crime occurred, however, they did not recant or retreat from their accusations.

[13] 23 M.J. 374, 377 (C.M.A. 1987).

[14] 23 M.J. 770 (A.F.C.M.R. 1987); *see also* United States v. Crayton, 17 M.J. 932, 934 (A.F.C.M.R. 1984).

[15] *Barror* at 372; see *Codero*, 22 M.J. at 221, 223.

[16] 384 U.S. 436 (1966).

[17] 25 M.J. at 525.

[18] 25 M.J. at 525–26.

[19] 106 S.Ct. 1404 (1986).

[20] See Maine v. Moulton, 106 S.Ct. 477 (1985).

[21] United States v. Wattenbarger, 21 M.J. 41, 43–44 (C.M.A. 1985); Mil. R. Evid. 305(d)(1)(B); *see* Brewer v. Williams, 430 U.S. 387, 401 (1977).

[22] Maine v. Moulton, 106 S.Ct. at 485.

[23] Michigan v. Jackson, 106 S.Ct. at 1409.

[24] *Id.* at 1410.

governmental body he represents. Captain Alfred H. Novotne.

To Deport or Not to Deport—That Is the Question

In this the media age of motion pictures such as *Star Trek, Close Encounters of the Third Kind, Aliens,* and *E.T.* it is easy to forget that all "aliens" are not extra-terrestrials. As defined in our immigration law, an alien is any person not a citizen or national of the United States.[25] If you are a military defense counsel, odds are that you have had or will have an alien client.

Who cares if your client facing a court-martial is also an alien? Your client, for one, because whether he knows it or not, your client may face deportation as a consequence of a court-martial conviction. The conditions under which an alien may be deported are detailed in 8 U.S.C. § 1251(a) (1982). Military accuseds would appear to fall under subsections a(4) and a(11) most frequently. An alien soldier may be deported who *inter alia:*

> (a) (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement . . . for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;
>
> . . .
>
> (a) (11) . . . at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana or who has been convicted of a violation of, or a conspiracy to violate any law or regulation governing or controlling the . . . sale, exchange, giving away . . . of opium, cocoa leaves, heroin, marihuana. . . .[26]

Of particular importance to the military practitioner is 8 U.S.C. § 1251(b)(2), which can operate to render the deportation provision of subsection a(4) inapplicable. This provision allows a sentencing authority to make a binding recommendation on the Attorney General of the United States that an alien convictee not be deported. The recommendation must be made at the time of first imposing judgment or passing sentence, or within thirty days thereafter. The provision, however, carves out offenses delineated in 8 U.S.C. § 1251(a)(11).

In *United States v. Berumen*[27] the Army Court of Military Review recently confirmed that a court-martial can be a basis for deportation, and that a military judge can act under § 1251(b)(2).[28] Berumen claimed he was denied effective assistance of counsel because counsel failed to advise him of possible deportation based upon the court-martial conviction. The court also considered whether the military judge had a *sua sponte* duty to advise the accused during the providence inquiry. The court held that 1) absent a specific inquiry from the client, a defense counsel is not required to apprise an accused of all the collateral consequences of his guilty plea; and 2) a military judge's responsibility to ascertain and explain collateral consequences during the providence inquiry is triggered when "the military judge, having been expressly placed on notice about collateral consequences that are 'major,' either induces or fails to correct an accused's misunderstanding about such consequences." In *Berumen,* the issue of deportation first arose at the appellate level. The court reserved judgment on whether misadvice by a defense counsel that is given in response to an accused's specific inquiry and that results in a guilty plea, necessarily constitutes ineffective assistance of counsel.[29]

The Colorado Supreme Court, in *People v. Pozo,*[30] addressed the issue upon which the Army court reserved judgment. The court commented that:

> When defense counsel in a criminal case is aware that his client is an alien, he may reasonably be required to investigate relevant immigration law. This duty stems not from a duty to advise specifically of deportation consequences, but rather from the more fundamental principle that attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients. In cases involving alien criminal defendants, for example, thorough knowledge of fundamental principles of deportation law may have significant impact on a client's decisions concerning plea negotiations and defense strategies.[31]

The issue of effective assistance of counsel becomes more compelling when one considers that the request to the sentencing authority must come within thirty days of trial.[32] The failure to make the request within the time period is an omission that cannot be remedied.

Being an effective advocate for your client means more than merely meeting the minimum standards of *Strickland v. Washington.*[33] The prudent defense counsel should make the consequence of deportation a part of any pretrial discussion with an alien client. The zealous defense counsel, after determining the wants, needs, and desires of the client, will request a binding nondeportation recommendation

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[25] 8 U.S.C. § 1101(a)(3) (1982).

[26] 8 U.S.C. §§ 1251(a)(4), (11) (1982).

[27] 24 M.J. 737 (A.C.M.R. 1987).

[28] *Id.* at 741 n.2.

[29] *Id.* at 742 n.5.

[30] 746 P.2d 523 (Colo. 1987) (en banc) (case remanded to determine whether counsel had reason to know before the plea was entered that appellant was an alien, or whether appellant was prejudiced by counsel's failure to research immigration law.)

[31] *Id.* at 2178.

[32] 8 U.S.C. § 1251(b)(2) (1982).

[33] 466 U.S. 668 (1984). The two-prong test for ineffective assistance of counsel set forth in *Strickland* consists of 1) whether defense counsel's performance was so deficient to render the counsel not functioning as the "counsel" guaranteed by the Sixth Amendment, and 2) whether defense counsel's deficient performance prejudiced the defense so as to deprive defendant of a fair trial—a trial whose result is reliable.

from the sentencing authority.[34] After all, the receipt of a favorable recommendation that enables your client to remain in the United States may be the most valuable service that you can provide. Captain Donald G. Curry, Jr.

Stipulations of Fact: Say No More Than Necessary

In *United States v. Neil,*[35] the Army Court of Military Review addressed stipulations of fact and their relationship to sentencing in guilty plea cases.[36] The problem in *Neil* was that the stipulation, prepared pursuant to a pretrial agreement, contained uncharged misconduct. The accused and the trial defense counsel agreed that the stipulation could be used in sentencing. The unusual fact in *Neil* was that the military judge specifically said, "I will punish you for these [uncharged] offenses."[37]

The Army Court of Military Review discussed uncharged misconduct and indicated that such evidence was admissible on sentencing when it constituted "an aggravating circumstance 'directly relating to or resulting from the offenses of which the accused has been found guilty.' "[38] The court stated that such information may be brought before the sentencing authority through a stipulation of fact.[39] The court did emphasize as a "cautionary measure" that the requirement of a pretrial agreement to enter into a stipulation of fact should be construed as requiring only a stipulation of facts as to the charges to which the accused is pleading guilty.[40] The court had previously expressed that position in *United States v. Sharper.*[41]

In *Neil,* however, the stipulation contained misconduct that did not concern an offense to which the accused had pled guilty. In addition, the judge expressly said he would sentence the accused "for" that misconduct. The Army court held that, although the uncharged misconduct could be "considered" by the sentencing body in determining a fair and just punishment, it was error to actually assess punishment "*for* the uncharged offenses."[42] Even though the sentence was less than that provided for in the pretrial agreement, the court could not rule out prejudice and reassessed the sentence.

Neil contains several teaching points for trial defense counsel. When negotiating a pretrial agreement and its associated stipulation of fact, keep the stipulation as short and pertinent as possible. Do not include uncharged misconduct that is completely unrelated to the case, and keep to a minimum uncharged matters that aggravate the charged offenses. Recently, attorneys at Defense Appellate Division have seen an increase in stipulations that contain totally extraneous information, such as data from personnel records, prior adverse actions against the accused, and descriptions (with sources usually not specified) of the characteristics and effects on the human body of various types of contraband drugs. Avoid that if possible. Of course, negotiate the best pretrial agreement and stipulation that you can.[43] But keep in mind that it is difficult for the trial court to ignore on sentencing any adverse information it has seen regarding the accused.

Furthermore, the distinction between "considering" uncharged misconduct and punishing "for" uncharged misconduct is a narrow one. Rarely will trial defense counsel have a judge or court member who expresses for the record that uncharged misconduct has been a factor in the sentence. Rather, in the usual situation, defense counsel will not know to what degree the sentencing authority related one to the other. The safest course of action for trial defense counsel is to expose the court to as little adverse information about a client as is possible. One way to do that

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[34] 8 U.S.C. § 1251(b)(2) (1982) requires that due notice be given to representatives of the interested state, the Immigration and Naturalization Service, and prosecution authorities, who shall be granted on opportunity to make representations in the matter prior to a recommendation being made. It is unclear how the hearing would proceed procedurally at a court-martial. It is also unclear whether, in a court-martial with members for sentencing, the nondeportation recommendation must come from the members or from the military judge.

[35] ACMR 8700754 (A.C.M.R. 19 Jan. 1988).

[36] *See generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial (R.C.M.) 811 [hereinafter R.C.M.]; R.C.M. 1001; Dep't of the Army, Pamphlet No. 27-173, Legal Services—Trial Procedure, paras. 22-8, 25-4 (15 Feb. 87); Dep't of the Army Pamphlet No. 27-22, Legal Services—Military Criminal Law Evidence, para. 10-4 (15 July 87); Green, *Stipulations of Fact and the Military Judge,* The Army Lawyer, Feb. 1988, at 40.

[37] *Neil,* slip op. at 2.

[38] *Id.* at 3, *quoting* R.C.M. 1001(b)(4).

[39] *Id.* at 3.

[40] *Id.* at 4, *quoting,* United States v. Manley, 25 M.J. 346 (C.M.A. 1987).

[41] 17 M.J. 803, 807 (A.C.M.R. 1984). In *Sharper,* however, the court added a caveat:

> [We] do not hold that an accused may be compelled to stipulate to any other facts in aggravation, such as the existence of personnel records which adversely reflect on his character or military service, or facts the Government would attempt to prove in rebuttal to evidence presented by an accused in extenuation or mitigation. While these issues have not been raised by this case, we have serious doubts about the propriety of such a provision.

Id.

[42] *Neil,* slip op. at 5 (emphasis in original).

[43] *Neil* noted, but did not resolve, a conflict in how the Army Court of Military Review deals with objections to the contents of stipulations. *Id.* slip op. at 3. In United States v. Taylor, 21 M.J. 1016 (A.C.M.R. 1986), the court cautions trial defense counsel not to include in a stipulation "unacceptable" information, planning later to challenge and litigate the stipulation at trial; rather, the court encourages counsel to fashion an acceptable stipulation outside the courtroom and not require the military judge to be an "arbiter in pretrial negotiations." 21 M.J. at 1017. United States v. Glazier, 24 M.J. 550 (A.C.M.R), *petition granted,* 25 M.J. 387 (C.M.A. 1987), sets out a different approach. *Glazier* declined to follow *Taylor,* and held that an accused must be able to seek evidentiary rulings from the military judge on the admissibility of the contents of a stipulation of fact. *Glazier,* 24 M.J. at 553. Once the military judge has ruled, the parties would be free to agree or disagree to the admission of the stipulation (with objectionable portions deleted), and elect whether to remain bound by the pretrial agreement. *Id.; see also* United States v. Keith, 17 M.J. 1078 (A.F.C.M.R. 1984) (if government insists on stipulating to inadmissible offenses as a condition to acceptance of the pretrial agreement, defense counsel should enter into the stipulation, if true, and raise the issue at trial), *certificate for review dismissed,* 21 M.J. 407 (C.M.A. 1986). *Glazier,* however, was criticized in United States v. Mullens, 24 M.J. 745 (A.C.M.R. 1987), which followed *Taylor,* and held that the trial judge's role is limited to ensuring that the stipulation does not violate a due process test of "fundamental fairness." *Mullens,* 24 M.J. at 749. *Taylor* and *Mullens* show the importance of keeping impermissible material out of the stipulation of fact; you may not get a later chance to challenge the material at trial. Should the government insist on keeping inadmissible information in the stipulation, however, counsel can attempt to use *Glazier* to support an argument that the trial judge should redact the objectionable portions.

is to include in stipulations of fact only what is absolutely necessary. Lieutenant Colonel Russell S. Estey.

Watch Out For Waiver

In a recent memorandum opinion, the Army Court of Military Review again emphasized the necessity for defense counsel to raise issues or face waiving them for appellate purposes. In *United States v. Snook*,[44] trial defense counsel failed to raise the issue of illegal pretrial confinement either before a military magistrate or at trial. Instead, defense counsel apprised the convening authority of this issue in post-trial submissions.[45] Subsequently, appellant submitted an affidavit to appellate defense counsel setting forth the conditions of his pretrial confinement that he believed were illegal. Appellate defense counsel then asserted that the conditions of appellant's pretrial confinement had violated Article 13 of the Uniform Code of Military Justice and requested additional credit against appellant's sentence to confinement.[46]

The Army Court of Military Review described the matters raised in appellant's affidavit as "pretrial matters" and concluded that appellant and his trial defense counsel "chose not to raise the issue for resolution at trial."[47] Citing *United States v. Palmiter*,[48] the court stated that appellant's failure to raise the issue of illegal pretrial confinement, while being subjected to it, was strong evidence that he was not illegally punished before his trial.[49] The Court declined to order additional sentence credit in the absence of substantive evidence that Article 13 had been violated.[50] This evidence was absent from the record because the issue had not been raised at trial.

The lesson to be learned from the *Snook* case is an oft-repeated one. Defense counsel *must* raise legal issues at trial or face the high hurdle of waiver on appeal. Captain Stephanie C. Spahn.

In Bargaining with the SJA—Be Aware of *Sales*

In *United States v. Sales*,[51] the Court of Military Appeals (CMA) discussed the sentence reassessment powers of the courts of military review. The Court of Military Appeals noted that if a court of military review cannot be "reasonably certain" of the severity of the sentence that would have been imposed at trial absent the error, the court should order a rehearing. Defense counsel should argue vigorously, in appropriate cases, that *Sales* applies with equal force to convening authorities. The recent case of *United States v. Maxwell*[52] illustrates just how critical a role defense counsel can play.

Maxwell, a promotable Sergeant First Class with 18 years of service, was convicted of rape after pleading guilty to adultery. He was sentenced to a dishonorable discharge, confinement for five years, and forfeiture of all pay and allowances. The convening authority reduced the confinement to three years, but otherwise approved the sentence. The Army Court of Military Review (ACMR) affirmed the findings as to the rape specification, but dismissed the adultery charge as inconsistent with the rape finding in accordance with *United States v. McCrae*.[53] The court reassessed and affirmed the sentence. On further appeal, CMA found evidentiary error, set aside the rape findings, and remanded the case to ACMR.[54] ACMR reinstated the adultery charge, conditionally set aside the sentence, and returned the record of trial to the convening authority with the following options: order a rehearing on the rape charge and the sentence; dismiss the rape charge if the rehearing was deemed impracticable and order a sentence rehearing on the adultery charge; or if both the rehearing on the sentence and the rape was deemed impracticable, reassess the sentence based on the adultery charge alone.[55] As you might expect, the convening authority exercised the third option and reassessed the sentence to a dishonorable discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to the grade of Private E–1, which is, incidentally, the maximum punishment for adultery. On further review, the ACMR ignored appellant's argument that *Sales* mandated a rehearing. ACMR agreed that it had exceeded the CMA mandate in returning the case to the convening authority and, based on this error, reassessed and affirmed a sentence of three months' confinement and forfeiture of $400.00 pay per month for three months.[56] Judge Smith, in a vigorous dissent, argued that *Sales* required a rehearing: "My brothers have not reassessed appellant's sentence, but have instead sentenced him."[57]

Defense counsel should insert themselves into the decision-making process when cases are remanded to the convening authority. Because neither CMA nor a CMR have defined "reasonable certainty," counsel should be prepared to argue that, unless the convening authority is convinced beyond reasonable doubt that an accused would have received at least a certain sentence if the error had not occurred, he should order a rehearing on sentence. Impracticability, that is, the cost of a rehearing versus the severity

[44] ACMR 8700328 (A.C.M.R. 15 Jan. 1988) (unpub.).

[45] *Id.* at 2.

[46] *Id.* at 1.

[47] *Id.* at 2.

[48] 20 M.J. 90, 96–97 (C.M.A. 1985).

[49] *Snook*, slip op. at 2.

[50] *Id.*

[51] 22 M.J. 305 (C.M.A. 1986).

[52] 25 M.J. 597 (A.C.M.R. 1987).

[53] 16 M.J. 485 (C.M.A. 1983).

[54] United States v. Maxwell, 21 M.J. 229 (C.M.A. 1986).

[55] United States v. Maxwell, CM 444049 (A.C.M.R. 30 Oct. 1987) (unpub.).

[56] *Maxwell*, 25 M.J. 597.

[57] *Id.* at 603.

of the maximum obtainable sentence, is not an appropriate standard.

Remember, defense counsel have an important role to play in this decision and should not hesitate to advocate this position. Even an apparently beneficial reassessment may not be the *Sales* bargain you thought it was. Major Stewart C. Hudson.

Pretrial Agreement: Restitution and Indigency

In *United States v. Foust,*[58] the Army Court of Military Review held that a promise to provide restitution by an accused is an enforceable provision in a pretrial agreement even where the reason for not making restitution is the indigency of the accused.[59] Prior to *Foust,* military courts did not allow the unbridled use of restitution provisions against an indigent accused. In 1974, the Army Court of Military Review held that pretrial agreements that increased the severity of punishment due to an accused's failure to make restitution were contrary to public policy if the accused was indigent.[60] The Rules for Courts-Martial recognize the pre-*Foust* limitations on the use of such provisions in a pretrial agreement: "Enforcement of a restitution clause may raise problems if the accused, despite good faith efforts, is unable to comply."[61] In *Foust,* the court removed any uncertainty as to the use of restitution provisions, holding that such provisions are now enforceable against an accused, indigent or not.

In *Foust,* the court sanctioned the enforcement of a pretrial agreement provision that linked the sentence limitation to the payment of restitution. If the accused made full restitution to the victim of his wrongful appropriation before arraignment, the pretrial agreement limited punishment to a bad-conduct discharge, six months confinement, total forfeitures, and reduction to Private E–1. If the accused failed to fully reimburse the victim before arraignment, then the sentence limitation increased to a dishonorable discharge, twelve months confinement, total forfeitures, and reduction to Private E–1.

The accused failed to make full restitution, repaying approximately one-third of the $3,000.00 debt. The convening authority approved a sentence that included eight months confinement. The accused thus suffered two extra months confinement due to his inability to make full restitution.

The Court held that the restitution provision, initiated by appellant and freely entered into by him, was not contrary to public policy even if indigency prevented appellant from making full restitution.[62] The Court reasoned that a contrary holding would allow an accused to manipulate the system to his or her advantage. An accused could offer and enter into a pretrial agreement that provided for more severe punishment if restitution was not made. The accused could then, upon failure to make restitution, declare indigency.[63] If indigency prohibited the imposition of the greater punishment, the accused would obtain a "windfall" by receiving the lesser punishment. In short, if an accused freely agrees to enter into a pretrial agreement that ties sentence severity to restitution, the restitution provision will be enforced absent a showing of government misconduct.[64]

Due to the questionable enforceability, prior to *Foust,* of restitution clauses, pretrial agreements that linked sentence limitations to restitution have been seldom utilized. *Foust* invites the use of restitution provisions as a bargaining element in pretrial agreements. Trial defense counsel must be aware that such provisions will not per se invalidate the agreement and will likely be enforced. A restitution provision does little good for a client unless it is probable that the client can satisfy the requirement. Therefore, in cases where repayment does not appear to be a realistic possibility, a restitution provision should be avoided. Captain Gregory B. Upton.

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[58] 25 M.J. 647 (A.C.M.R. 1987).

[59] 25 M.J. at 649; *see also* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 705(c)(2)(C) [hereinafter R.C.M.]

[60] United States v. Rodgers, 49 C.M.R. 268 (A.C.M.R. 1974); *see also* United States v. Brown, 4 M.J. 654 (A.C.M.R. 1977).

[61] R.C.M. 705(c)(2)(C) analysis (citing United States v. Brown, 4 M.J. 654 (1977)). To avoid potential problems with the pre-*Foust* limitations on restitution provisions, the Criminal Law Division at The Judge Advocate General's School recommended that convening authorities establish restitution as a condition precedent to acceptance of the pretrial agreement itself (as opposed to a provision in the agreement). Dep't of the Army, Pamphlet No. 27–173, Trial Procedure, para. 11–3*d*(4), at 73 n.69 (Feb. 1987).

[62] The court recognized that *Rodgers* and *Brown* suggest a contrary result. The court, however, stated that the precedential value of those decisions had eroded. *Foust,* 25 M.J. at 649.

[63] Indeed, most convicted soldiers could likely qualify as indigents.

[64] The Court suggests that misconduct may be found if the government requires the restitution provision as part of the pretrial agreement or the accused cannot pay because of government-initiated or government-induced activity. *Id.*

United States v. Holt: the Use of Providence Inquiry Information During Sentencing.

Captain Jody M. Prescott
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The admissibility of providence inquiry information during sentencing and the propriety of its use were recently argued before the United States Court of Military Appeals in *United States v. Holt.*[1] Although the court noted that the case could be resolved on the basis of waiver, the extent of the permissible use of providence inquiry information remains a problem for counsel in the field. This article seeks to address the admissibility of such evidence under the current Military Rules of Evidence and Rules for Courts-Martial, and the rationale behind the provisions of the 1984 Manual for Courts-Martial that appear to allow use of providence inquiry information during sentencing.[2]

At trial the accused pleaded guilty to the wrongful distribution of methamphetamine.[3] During the providence inquiry, the accused testified under oath with respect to the methamphetamine transaction.[4] The accused stated that, in response to a phone call from a registered source requesting drugs, he sought out his roommate to determine whether the drugs were available.[5] The accused found his roommate and another soldier unconscious and intoxicated.[6] As the accused attempted to arouse his roommate to obtain the drugs, the other soldier awoke and stated that the roommate did not know where the drugs were, but that another soldier in the barracks ("Specialist Fikes")[7] had them. The accused went to Fike's room and found the methamphetamine, which he then sold to the registered source and an undercover agent from the Criminal Investigation Division (CID).[8]

During the extenuation and mitigation phase of the accused's trial before the military judge alone, a CID agent testified as to the accused's cooperation with the CID.[9] On cross-examination, the CID agent testified that the accused had implicated his roommate in a sworn statement by saying that when he awoke his roommate, it was his roommate who told him where to get the methamphetamine.[10]

During his sentencing argument, trial counsel noted the inconsistency between the accused's statements to the CID and his testimony during the providence inquiry with regard to the source of the drug information.[11] The defense counsel did not object to trial counsel's argument,[12] and the military judge did not indicate whether trial counsel's argument was a factor in his determination of defendant's sentence.[13]

On appeal, the Army Court of Military Review upheld the trial counsel's use of the providence inquiry information during sentencing.[14] The Army Court began its analysis with a discussion of *United States v. Arceneaux,*[15] in which evidence concerning prior acts of uncharged misconduct was elicited during Arceneaux's providence inquiry. In *Arceneaux,* the military judge used this evidence during his questioning of certain sentencing witnesses and in his determination of an appropriate sentence.[16] The Army Court of Military Review upheld the use of the evidence in question in that case, and set out the evidentiary standards that determine whether such evidence was properly admissible during sentencing.[17]

The Army court in *Holt* noted changes in the providence inquiry and sentencing procedure under the 1984 Manual that made the use of providence inquiry information during sentencing proper despite precedent to the contrary.[18] While recognizing the necessity of "the free flow of information between trial judge and the accused," the Army court also noted that the intent of the oath requirement and the possibility of a perjury prosecution was to "tip" the scales "in favor of finality and truthfulness."[19] Further, in

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[1] 22 M.J. 553 (A.C.M.R. 1986), *petition granted,* 23 M.J. 358 (C.M.A. 1987) (argued 29 Sept. 1987).

[2] Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 910 and 1001 [hereinafter R.C.M.].

[3] 22 M.J. at 554.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 556–57.

[15] 21 M.J. 571 (A.C.M.R. 1985).

[16] *Id.* at 572.

[17] *Id.* at 572–73.

[18] 22 M.J. at 554–55.

[19] *Id.* at 555–56.

light of the possibility of a perjury prosecution, the Army Court held that "any 'chilling' effect arising from use of the information during sentencing [was] *de minimis*."[20]

The *Holt* court also noted that the rationale behind the exclusion of statements and pleas made during unsuccessful or withdrawn pleas was inapplicable because the plea in *Holt* was successful.[21] Further, the court found that "the use of providence inquiry information enhance[d] the sentencing authority's ability to consider all relevant information in determining a just sentence."[22] Finally, the court noted that the new military sentencing procedure was intended to approximate federal sentencing procedures, and such information was therefore properly used if it met the admissibility requirements of sentencing evidence.[23]

The Pre-1984 Basis for Exclusion of Providence Inquiry Information During Sentencing.

Under both the 1951[24] and 1969[25] Manuals for Courts-Martial, the accused was not put under oath during the providence inquiry. The Court of Military Appeals held that this reflected a policy judgement that due process in determining the validity of an accused's plea was best complied with when "the greatest possible encouragement [was] accorded the accused to speak freely and without fear."[26] The Court of Military Appeals found the use of an oath in the providence inquiry to be inappropriate, because it might "have a dampening effect upon a person's willingness to speak, freely and fully, on a subject."[27]

Consistent with this reasoning, the service courts of military review have found the use of providence inquiry information during sentencing to be error. For example, in *United States v. Richardson*,[28] the Navy Court of Military Review disapproved a trial judge's consideration of such information, because it "would tend to inhibit the accused in his responses, and [was] therefore, inconsistent with the law's desire for optimum freedom of exchange between the judge and the accused, and contrary to the spirit of the inquiry."[29] Similarly, the Army Court of Military Review, in *United States v. Brown*,[30] found a trial counsel's reference during his sentencing argument to the accused's alleged distribution of marijuana that was disclosed during the providence inquiry to be improper.

The Army Court in *Brown* also noted an additional reason why the use of such information was improper, namely, that such information was not evidence, and counsel have a responsibility "to argue only evidence of record." The implication that statements made during the providence inquiry are not evidence is supported by the service courts of military review's prior holdings that other unsworn statements made by an accused are not considered evidence.[31]

The Rationale Behind the 1984 Manual Changes in the Providence Inquiry.

The 1984 Manual reflects significant changes in the providence inquiry procedure. In a complete departure from previous practice, the accused is now questioned under oath by the military judge during the providence inquiry.[32] Further, if the accused's sworn statements are made on the record and in the presence of counsel, those statements may be used in a perjury prosecution against him.[33]

The Drafter's Analysis makes sparse reference to the rationale behind these changes, noting only, for example, that R.C.M. 910(c)(5) corresponds to Military Rule of Evidence 410.[34] Likewise, the analysis notes only that the oath requirement of R.C.M. 910(e) is designed to ensure compliance with article 45 of the Uniform Code of Military Justice [UCMJ], and to reduce the likelihood of later baseless attacks on the providence of the plea.[35] As with Mil. R. Evid 410, the analysis of R.C.M. 910(e) also cites Federal Rule of Evidence 410.[36]

The legislative history of Federal Rule of Evidence 410 shows that it is inextricably intertwined with Federal Rule of Criminal Procedure 11(e)(6).[37] As enacted, Fed. R. Evid 410 contained a proviso that delayed its effective date until 1 August 1975, and provided that it was to be superseded

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[20] *Id.* at 556.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 556–57.

[24] Manual for Courts-Martial, United States, 1951, para. 70*b* & Appendix 8a.

[25] Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 70*b* & Appendix 8b.

[26] United States v. Simpson, 17 C.M.A. 44, 46, 37 C.M.R. 308, 310 (1967).

[27] *Id.*

[28] 6 M.J. 654, 655 (N.C.M.R. 1978), *petition denied*, 6 M.J. 280 (C.M.A. 1979).

[29] *Id.*

[30] 17 M.J. 987, 989 (A.C.M.R.), *petition denied*, 19 M.J. 1 (C.M.A. 1984) (this case was decided on 30 March 1984, before the 1 August 1984 effective date of the Manual for Courts-Martial, United States, 1984).

[31] *See* United States v. Schriver, 16 C.M.R. 429 (N.C.M.R. 1954); *see also* R.C.M. 1001(c)(2)(C). A presentencing sworn statement by the accused, however, does constitute evidence, because it is given under oath and subject to cross-examination.

[32] R.C.M. 910(e). The validity of the oath requirement has been confirmed by the Court of Military Appeals. United States v. Fletcher, 21 M.J. 162, 63 (C.M.A. 1985) (summary disposition).

[33] R.C.M. 910(c)(5).

[34] R.C.M. 910(c)(5) analysis at A21–53.

[35] R.C.M. 910(e) analysis at A21–53.

[36] Mil. R. Evid. 410 analysis at A22–33; R.C.M. 910(e) analysis at A21–53.

[37] *See* 2 J. Weinstein & M. Berger, Weinstein's Evidence 410–13 to 410–19 (1986) (synopsis of legislative history of Federal Rule of Evidence 410); 23 C. Wright & K. Graham, Federal Practice and Procedure § 5341 (1980) (synopsis of legislative history of Federal Rule of Criminal Procedure 11 and Federal Rule of Evidence 410).

by any amendment to the Federal Rules of Criminal Procedure that was inconsistent with it.[38] Federal Rule of Criminal Procedure 11(e)(6) was expressly designed to supplant Fed. R. Evid. 410; it took effect on 1 August 1975.[39]

The legislative history of Fed. R. Crim. P. 11(e)(6) shows that a great deal of conflict during its creation revolved around the extent that statements made by the accused during plea negotiations and the plea inquiry could be used against him in subsequent criminal proceedings.[40] The Notes of the House Judiciary Committee recognized the widespread use of plea bargaining, and that the "limited exception [for perjury] may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements."[41] The Judiciary Committee noted, however, that "[it] believe[d] on balance, it [was] more important to protect the integrity of the judicial system from willful deceit and untruthfulness."[42]

The rationale behind the institution of the oath requirement in the 1984 Manual must therefore be construed in light of the Notes of the House Judiciary Committee, and the additional purposes stated in the applicable portions of the Drafter's Analysis of the 1984 Manual. As previously noted, the Drafter's Analysis to R.C.M. 910(e) states that the purpose of the oath is to reduce the likelihood of baseless attacks on the providence of the plea, and to ensure compliance with Article 45 of the Uniform Code of Military Justice.[43] Under UCMJ, article 45, the military judge is required to determine the factual accuracy and voluntariness of the plea through a detailed inquiry of the accused.

On this basis, it appears that the integrity of the judicial system is best protected when the military judge, acting pursuant to his responsibilities under UCMJ article 45, has the accused set out under oath a detailed and comprehensive account of all the facts and circumstances surrounding his plea.[44] The threat of a perjury prosecution may in many cases be just that, given the inconvenience in bringing additional charges to trial and the further difficulties in proving it.[45] Although the possibility of a perjury prosecution is certainly an inducement for the accused to tell the truth, it does nothing to repair any damage already done to the judicial system through the consideration of tainted evidence.[46]

The Rationale Behind the 1984 Changes in the Sentencing Procedure.

The 1984 Manual also reflects significant changes in the sentencing procedure under Rule for Courts-Martial 1001.[47] Such changes include deleting the exclusion of convictions more than six years old,[48] and eliminating the requirement that a conviction be final before it may be considered by the court-martial on sentencing.[49] Further, trial counsel may now present evidence of the accused's character as a soldier and rehabilitative potential.[50]

The Drafter's Analysis to R.C.M. 1001 notes that the sentencing procedure used in federal civilian courts can only be followed to a limited degree, because the armed forces do not have an equivalent to the probation service, which prepares presentencing reports.[51] R.C.M. 1001, however, is designed to allow the presentation of much of the same information to the court-martial as would be contained in a presentence report.[52] The presentation of such information occurs within the protection of an adversarial setting, however, to which the rules of evidence apply (although they may be relaxed for certain purposes).[53]

A fundamental premise of federal sentencing procedure is that the best sentencing decision is made when the judge has all relevant information with regard to the offense and the offender before him to consider.[54] Accordingly, a federal trial judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may

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[38] 2 J. Weinstein & M. Berger, *supra* note 37, at 410–13 to 410–19; 23 C. Wright & K. Graham, *supra* note 37, § 5341.

[39] 2 J. Weinstein & M. Berger, *supra* note 37, at 410–13 to 410–19; 23 C. Wright & K. Graham, *supra* note 37, § 5341.

[40] 2 J. Weinstein & M. Berger, *supra* note 37, at 410–13 to 410–19; 23 C. Wright & K. Graham, *supra* note 37, § 5341. Of the various versions of Fed. R. Crim. P. 11(e)(6) suggested, the House of Representatives' version was finally accepted.

[41] Notes of the Committee on the Judiciary, H.R. 94–247, 18 U.S.C. Rule 11, at 18 (1982).

[42] *Id.*

[43] R.C.M. 910(e) analysis at A21–53.

[44] In upholding the validity of the oath requirement of R.C.M. 910(e), the Navy Marine Court of Military Review noted:

> [T]hat any deleterious effect that the 910(d) oath requirement might have on an accused's willingness to plead guilty or to speak freely during the inquiry into the voluntariness of his pleas is far outweighed by the reduction of baseless collateral attacks on guilty pleas, the protection of an accused from falsely pleading guilty, and the shielding of the judicial process from willful deceit and untruthfulness.

United States v. Daniels, 20 M.J. 648, 651 (N.M.C.M.R. 1985), *petition denied*, 24 M.J. 455 (C.M.A. 1987). The Army court, in *Holt*, also noted "[t]he oath's powerful incentive for truth telling" as an "additional rationale" for instituting the oath requirement. 22 M.J. at 555 (citing Blackledge v. Allison, 431 U.S. 63 (1977)); *cf.* Mil. R. Evid. 603 (an oath or affirmation required of all witnesses who testify in court).

[45] *Cf.* Vaughn, *I Swear That I'm Guilty, So Help Me God: The Oath In Rule 11 Proceedings*, 46 Fordham L. Rev. 1242, 1260–61 (1977–78).

[46] *Cf.* Uniform Code of Military Justice art. 45, 10 U.S.C. § 845 (1982) [hereinafter UCMJ]; United States v. Thomas, 22 M.J. 388 (C.M.A. 1986) (an oath is "an added guarantee of the accuracy of the guilty plea").

[47] United States v. Harrod, 20 M.J. 777, 779 (A.C.M.R. 1985) (changes in the presentencing procedure have "greatly expand[ed] the types of information that [can] be presented to a court-martial during the adversarial presentence proceding").

[48] R.C.M. 1001(b)(3)(A).

[49] R.C.M. 1001(b)(3)(B).

[50] R.C.M. 1001(b)(5).

[51] R.C.M. 1001 analysis at A21–63.

[52] *Id.*

[53] *Id.*

[54] United States v. Tucker, 404 U.S. 443 (1972); *see also* R.C.M. 1001(f)(2)(A), which allows a court-martial to consider "[a]ny evidence properly introduced on the merits before findings; including . . . [e]vidence of other offenses or acts or misconduct even if introduced for a limited purpose."

come."[55] Indeed, a federal court may even consider hearsay[56] or information gathered in violation of the accused's fourth amendment rights.[57]

The use in sentencing of evidence elicited from the accused during the providence inquiry is therefore not only consistent with federal sentencing practice, but also with the rationale behind the institution of the oath requirement. The integrity of the judicial system is protected, not only because the judge elicits a reliable and comprehensive set of facts from the accused to support the providency of the plea, but also because the court arrives at a fair sentence based in part on the same information.

The Admissibility of Providence Inquiry Information Under the Current Military Rules of Evidence and Rules for Courts-Martial.

Regardless of whether policy rationales exist that would favor use of such evidence during sentencing, any such evidence proffered during sentencing must be examined by the military judge to determine whether it is admissible. Under the standard set forth by the Court of Military Appeals in *United States v. Martin*,[58] it appears that providence inquiry evidence could indeed be admissible.

Under Mil. R. Evid. 401, the military judge would first have to determine whether the information is relevant; that is, if believed, would it tend to prove or disapprove the existence of facts permitted by the sentencing rules? This particular inquiry has two implicit aspects to it: does the evidence have probative value, and is it reliable? Traditionally, such characteristics were lacking from providence inquiry information.[59]

Information given by the defendant in court under oath with regard to his guilt certainly can be probative, if it possesses the indicia of truthfulness and reliability traditionally required of evidence. Under R.C.M. 910, the factual and procedural basis of the plea is made clear by the military judge's detailed inquiry into the voluntariness and accuracy of the plea.[60] Although the military judge's inquiry of the accused is not cross-examination, it is under oath and certainly inquisitorial, given the atmosphere of the court room and the source and tenor of the questions.[61]

The next step is to determine whether the admission of such information is prohibited by the Constitution as applied to the Armed Forces, the Code, the Military Rules of Evidence, the Manual, or an applicable act of Congress.[62] While none of the these documents or laws expressly prohibit admission, consideration of two things, namely, the fifth amendment of the United States Constitution, and the interplay between R.C.M. 910 and Mil. R. Evid. 410, shed further light on the admissibility of such information.

During oral argument in *Holt*, appellate defense counsel contended that the use of such evidence violated the accused's right against self-incrimination, which the Court of Military Appeals had held was applicable during sentencing in *United States v. Cowles*.[63]

While *Cowles* noted that the fifth amendment was applicable to sentencing, it also noted that, with regard to the providence inquiry, the accused waives the right against self-incrimination "as to matters relating to guilt."[64] It should also be noted, however, that if the accused wishes, he can stop answering the military judge at anytime and reassert his fifth amendment right. The accused is therefore not forced to incriminate himself.

Although inapplicable to the use of statements made in connection with a successful guilty plea, the rationale behind the exclusion of unsuccessful or withdrawn guilty pleas, and the exclusion of statements made in connection with them,[65] also tends to demonstrate the propriety of using providence inquiry evidence in sentencing. While these two provisions clearly work together, the exclusion of failed pleas has a very different rationale behind it than does the exclusion of statements regarding those pleas.

Because the military provisions are derived from their federal counterparts, Federal Rule of Criminal Procedure 11e(6) and Federal Rule of Evidence 410, the legislative and caselaw history behind the federal provisions is especially relevant. As the United States Supreme Court held in *Kercheval v. United States*: "[A] plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction."[66] Accordingly, if the accused later requests to change his plea, the trial court will exercise its discretion to allow an accused to substitute a plea of not guilty without any finding on its part of the accused's guilt or innocence.[67] If the accused is allowed to change his plea, subsequent use of the plea as evidence against the accused in a trial on the merits is forbidden, since such action would be equivalent to reinstating the withdrawn plea *pro tanto*.[68]

In contrast to the notions of fundamental fairness that underlie the exclusion of withdrawn guilty plea as evidence

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[55] 404 U.S. at 446–47.

[56] United States v. Ashley, 555 F.2d 462 (5th Cir.), *cert. denied*, 434 U.S. 869 (1977).

[57] United States v. Larios, 640 F.2d 938, 942 (9th Cir. 1981).

[58] 20 M.J. 227 (C.M.A. 1985), *certiorari denied*, 107 S.Ct. 323 (1986).

[59] *Cf. Brown*, 17 M.J. 987 (providence inquiry information not evidence); United States v. Rundle, 268 F. Supp. 691 (E.D. Pa. 1967), *aff'd*, 405 F.2d 1037 (3rd Cir. 1969) (plea is not made under oath, nor is it subject to cross examination, and is thereby merely a procedural mechanism, not evidence).

[60] *See also* United States v. Care, 18 C.M.A. 535, 410 C.M.R. 247 (C.M.A. 1967).

[61] *Accord Rundle*, 268 F. Supp. at 698.

[62] Mil. R. Evid. 402.

[63] 16 M.J. 467 (C.M.A. 1983).

[64] *Id.* at 468.

[65] *See* R.C.M. 910, Mil. R. Evid. 410.

[66] 274 U.S. 220, 223 (1927).

[67] *Id.* at 224.

[68] *Id.*

in subsequent trials, the exclusion of statements made with regard to those pleas under Federal Rule of Criminal Procedure 11(e)(6)(C) is grounded primarily on considerations of systemic efficiency. Rule 11(e)(6)(C) "permit[s] the unrestrained candor which produces effective plea discussions between the attorney for the Government and the attorney for the defendant or the defendant when acting *pro se*."[69] Thus, not only would the letter of Rule for Courts-Martial 910 or Military Rule of Evidence 410 be inapplicable, because the situation does not involve an unsuccessful or withdrawn plea, but the spirit behind the exclusion of statements made in connection with such pleas is also inapplicable in light of the rationale behind the oath requirement.

The next step in analysis of the proffered evidence is to determine whether it is admissible under the Military Rules of Evidence or the relaxed rules of sentencing.[70] If, for example, the accused does not take the stand during sentencing, then the providence inquiry information could be read into the record under the hearsay exception for former testimony.[71] Further, the evidence could come in for purposes of rebuttal,[72] aggravation,[73] or even with regard to rehabilitation.[74]

Finally, the court would have to determine whether the evidence is more probative than unfairly prejudicial.[75] As previously noted, sworn statements made by the accused with respect to his guilt can be highly probative. There also appears to be no unfair prejudice to the accused, because he voluntarily waived his right against self-incrimination in making the statements, in the hope of having his guilty plea considered as a mitigating factor in his punishment.[76]

Policy Ramifications

During oral argument in *Holt*, Chief Judge Everett raised the question of defense counsel's role when the military judge's inquiry begins to implicate aggravating circumstances. Pursuant to his responsibilities under UCMJ article 45, a military judge is required to make a searching inquiry of the accused to determine to the military judge's satisfaction that the plea is both voluntary and factually accurate.[77] When the inquiry appears to be heading toward areas the defense considers not necessary to a determination of the providence of the accused's plea, however, it is proper for defense counsel to bring to the military judge's attention that possibility. If the military judge insists on conducting further inquiry, defense counsel may wish to consult with his client and determine if he wishes to continue to plead guilty and undergo further inquiry, or change his plea.

Judge Cox was curious whether the military judge could use the providence inquiry as a means to gather information for sentencing. This issue was recently addressed by the Coast Guard Court of Military Review in *United States v. Miller*, in which a military judge's questioning of an accused during the providence inquiry with the expressed intent to derive evidence to be used on sentencing was found to be error.[78] While the Coast Guard Court found the military judge's questioning to be beyond the proper scope of the providence inquiry as set out by R.C.M. 910, it expressly did not decide "the question whether matters *properly* developed with respect to the pleas of guilty can be considered later by the judge as bearing on the sentence determination when the pleas inquiry was the only source of the information."[79]

The Court of Military Appeals also inquired, during oral argument in *Holt*, whether defense counsel could bring in the sentencing panel to hear the providence inquiry and observe the demeanor of the accused. Because evidence of pleas and statements made with regard to those pleas are inadmissible in subsequent criminal proceedings if the pleas are later withdrawn or unsuccessful,[80] however, it would be proper for the military judge to exclude a panel from hearing information that potentially would be inadmissible sentencing evidence.

Finally, the Court also expressed concern, with regard to trials involving mixed pleas, as to the propriety of using providence inquiry information derived from accepted pleas before a sentencing panel. Such a situation would not be prejudicial to an accused, however, for it is analogous to a panel being informed of an accused's pleas when they determine guilt of the charged offense, after the accused has admitted to lesser included offenses.[81]

Conclusion

The institution of the oath requirement vitiates the previous policy rationale behind excluding providence inquiry evidence. In light of the drafter's decision to protect the judicial system's integrity through disclosure of all facts and new sentencing procedure desiring use of these facts, providence inquiry information should be admissible on sentencing.

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[69] *See* Fed. R. Crim. P. 11, and the Notes of Advisory Committee on Rules thereto.

[70] 20 M.J. 227, R.C.M. 1001.

[71] Mil. R. Evid. 804(b)(1).

[72] R.C.M. 1001(d).

[73] R.C.M. 1001(b)(4).

[74] R.C.M. 1001(b)(5).

[75] Mil. R. Evid. 403.

[76] R.C.M. 1001(f) (a guilty plea is a mitigating factor). Such evidence is certainly less unfairly prejudicial than a typical admission under Mil. R. Evid. 801(d)(2), because it is sworn, in-court testimony of the accused himself. Further, the Tenth Circuit Court of Appeals has held that, in light of the congressional intent to allow all relevant information with regard to defendant's background in on sentencing, and the non-applicability of Federal Rules of Evidence at sentencing, statements made during unsuccessful plea negotiations are admissible during sentencing. United States v. Ruminer, 786 F.2d 381 (10th Cir. 1986).

[77] R.C.M. 910.

[78] United States v. Miller, 23 M.J. 553, (C.G.C.M.R. 1986), *reconsidered*, 23 M.J. 837 (C.G.C.M.R.), *petition denied*, 24 M.J. 348 (C.M.A. 1987).

[79] *Id.* at 556.

[80] R.C.M. 910; Mil. R. Evid. 410.

[81] R.C.M. 910(a)(1); Manual for Courts-Martial, United States, 1984, Part IV, para. 2.

Article 32(c): A Forgotten Provision Can Assist the Prosecutor

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How many of us, as prosecutors, have thought that Article 32[1] ended with subsection (b), the substantial rights enuring to an accused whose case merits a general court-martial? Yet, failure to read further in Article 32 could cost the prosecution in wasted time and effort, as well as the loss of a tactical advantage.

Commentators have treated Article 32(c)[2] in a cursory fashion, largely by simple recitation of its terms.[3] Such treatment is consistent with the historical use of Article 32(c). Historically, it has been a rarely used provision, and then generally used by the defense to demand further investigation where additional charges are preferred as a result of the investigation of the original charges.[4] But the language of the article is considerably more expansive, providing opportunities for the prosecutor beyond the simple case where an Article 32(b) investigation has been held previously. Two examples illustrate potential use of Article 32(c):

Example 1: A commander convenes a formal investigation[5] to investigate the loss or destruction of property. The investigation may have two purposes: determining financial responsibility for the loss or destruction,[6] and determining whether the loss was the result of criminal activity.[7]

Example 2: Criminal acts occur off the installation. The local police apprehend a soldier as the offender and arraign him before the local magistrate. A preliminary hearing[8] is conducted and the magistrate finds probable cause to believe that the soldier committed the offenses with which he is charged. Before trial on the merits, however, the local civilian prosecutor determines not to prosecute the soldier. The soldier is then returned to military control, where his commander prefers charges and prosecutes the soldier for the same acts.[9]

In either example, Article 32(c) may provide an alternative to conducting an Article 32(b) investigation. Under Article 32(c), the prior investigation could be used in lieu of the investigation required under Article 32(b). This article will discuss the advantages of using this alternative procedure and how to take advantage of the benefits of Article 32(c).

Why Use the Article 32(c) Procedure?

The first enemy of the prosecutor is time. Under the current Manual for Courts-Martial,[10] the government has set time limits within which to bring the accused soldier to trial.[11] Use of Article 32(c) may aid the prosecutor by cutting the number of days for which the government is accountable and, in some cases, the actual number of days from preferral of charges to referral to trial.

Under R.C.M. 707(c)(3), the government is not accountable for "delay . . . at the request or with the consent of the defense." A defense demand for further investigation requires a delay in the processing of the charges and their referral to trial. The further investigation cannot occur instantaneously; time is required to appoint an investigating officer, obtain necessary witnesses and prepare the report of

[1] Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982) [hereinafter UCMJ].

[2] Article 32(c) states:

> If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer new evidence in his own behalf.

[3] *See, e.g.*, D. Schlueter, Military Criminal Justice: Practice and Procedure § 7-2 & n.8 (2d ed. 1986); Gaydos, *A Comprehensive Guide to the Military Pretrial Investigation*, 111 Mil. L. Rev. 49, 84 (1986).

[4] *E.g.*, United States v. Stratton, 12 M.J. 998, 999 n.2 (A.F.C.M.R. 1982); United States v. Lane, 34 C.M.R. 744 (C.G.B.R. 1964); United States v. Holstron, 37 C.M.R. (A.F.B.R. 1967).

[5] Dep't of Army, Reg. No. 15-6, Boards, Commissions & Committees—Procedures for Investigating Officers & Boards of Officers, paras. 1-2, 5-1 through 5-11 (24 Aug. 1977) [hereinafter AR 15-6].

[6] *See* Dep't of Army, Reg: No. 735-5, Property Accountability Policies and Procedures for Property Accountability, para. 13-2 (14 Jan. 1988).

[7] *See* United States v. Gandy, 9 C.M.A. 355, 26 C.M.R. 135, 139 (1958) (investigation into losses from ships stores); United States v. Finch, 22 C.M.R. 861, 865 (N.B.R. 1956) (proceedings in a court of inquiry may be used in lieu of an Article 32(b) investigation).

[8] As will be discussed *infra*, this example requires the use of a state preliminary hearing procedure, rather than a grand jury procedure. For purposes of discussion, the California preliminary hearing procedure will be used. Cal. Penal Code §§ 859-872 (West 1987).

[9] Prior to the Supreme Court's decision in Solorio v. United States, 107 S. Ct. 2924 (1987), a scenario such as this would occur only rarely because of the inability of the military to establish service connection. *See* O'Callahan v. Parker 395 U.S. 258 (1969); Relford v. Commandant, 401 U.S. 355 (1971) (one of the 21 factors to consider was the desires of the civilian criminal justice system to exercise jurisdiction). With the *Solorio* decision, the status of the accused is once again the only criteria for establishing military jurisdiction over the offense. Accordingly, the possibility of exercising court-martial jurisdiction in such a case is substantially increased.

[10] Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

[11] MCM, 1984, Rule for Courts-Martial 707 [hereinafter R.C.M.]. Normally, the accused must be brought to trial with 120 days of government accountable time: 90 days if the accused is in confinement. *Id.*

Additionally, the "90 day" and "demand" rules created by United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971), may also be applicable. *See* R.C.M. 707(a) & (d) analysis; *See also* United States v. Harvey, 22 M.J. 904 (N.M.C.M.R.) (the demand rule prong of *Burton* is no longer the law in light of R.C.M. 707), *rev'd*, 23 M.J. 280, 280 n.* (C.M.A. 1986) (mem. opinion) ("we have not ascertained any Presidential intent to overrule *Burton*, [thus] we need not inquire as to his power to displace a judicial decision predicated on Article 10").

investigation. "Reasonable"[12] delay from the date of the accused's demand for further investigation to the date of the report, therefore, may be excluded from government accountability. In this sense, the delay caused by the demand is similar to a request for sanity board, which is specifically excluded from government accountability by the Rules for Court-Martial,[13] or where the accused stands upon his right not to be tried within five days after service of the charges upon him.[14] Nor is the required delay substantially different from the situation where, during the course of an Article 32(b) investigation, the defense requests the production of other evidence or witnesses that will take time to obtain. The precise contours of defense delay are unclear, however, and trial counsel must exercise caution.[15]

Of course, should the accused not demand further investigation, the government will have saved the actual time, effort, and expense normally required to conduct an Article 32(b) investigation and prepare the report. The only remaining requirement prior to referral is to prepare the staff judge advocate's pretrial advice.[16]

A second, but equally important, reason to utilize the Article 32(c) procedure is the tactical advantage that the prosecution obtains. At an Article 32(b) investigation, the prosecutor develops sufficient evidence to provide the investigating officer with reasonable grounds to believe that the accused committed the charged offenses. This allows the defense to discover the government's case and to assess the quality of the government's witnesses.[17]

Where there has already been a prior investigation that the government introduces as part of the record,[18] the probable cause determination has generally already been made. If the defense demands subsequent investigation pursuant to Article 32(c), the "normal" roles of prosecution and defense are reversed. The defense must now bear the burden of lead examination. The prosecution benefits from the discovery provided by the investigation without the necessity of presenting a "dry run" of its essential witnesses.

Regardless of whether the defense demands or waives further investigation, the government bears little risk in utilizing the Article 32(c) procedure. The accused has the right to an impartial determination of probable cause based upon a thorough investigation of the evidence.[19] When the Article 32(c) procedure is utilized, the defense plays an active role in determining the thoroughness of the investigation.

If the accused waives further investigation, he certainly should not be heard to complain at trial that the prior investigation was incomplete.[20] He had the opportunity to demand further investigation and thus cure the incompleteness. Where the accused demands further investigation, he must determine which witnesses he wishes to call or recall. Accordingly, if all the requested witnesses are presented at the hearing, the thoroughness of the investigation is unquestionable. Of course, the accused may always complain that the investigation was not impartial. Similarly, the possibility always exists that the accused will object if requested witnesses are determined by the investigating officer to be either irrelevant, cumulative, or unavailable. The risk of either complaint, however, is no greater for the Article 32(c) proceeding than it would be for an Article 32(b) investigation.

When Is Use of Article 32(c) Appropriate?

Four elements must be present to qualify an investigation as a "prior investigation" under Article 32(c): the investigation must have been conducted prior to the preferral of charges; the accused must have been present at that investigation; the accused must have had the same substantial rights to counsel, cross-examination of witnesses, and presentation of evidence as during an Article 32(b) investigation; and the prior investigation must have involved the same "subject matter."

"Prior Investigation"

Article 32(c) requires that the investigation be conducted prior to the accused being "charged with the offense."[21] Thus, only where the investigation is conducted prior to the preferral of charges does the Article apply. In Example 2,

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[12] The government is expected to use due diligence in conducting the further investigation.

[13] R.C.M. 707(c)(1).

[14] UCMJ art. 35; United States v. Cherok, 21 M.J. 438, 440 (C.M.A. 1986) (government not accountable under *Burton* 90 day rule for five day delay occasioned by defense invocation of Article 35).

[15] United States v. Freeman, 23 M.J. 531, 535 (A.C.M.R. 1986), *petition filed*, 24 M.J. 438 (C.M.A. 1987) (defense accountable for delay necessary to translate German police report). *But see* United States v. Brodin, 25 M.J. 580 (A.C.M.R. 1987) (it was not delay "at the request or with the consent of the defense" under R.C.M. 707(c)(3) when defense counsel objected to the Article 32 investigating officer (IO) considering an unauthenticated statement and the IO delayed the investigation and attempted to obtain the testimony; charges dismissed).

[16] UCMJ art. 34; R.C.M. 406.

[17] Defense discovery has been recognized as a proper purpose of the Article 32(b) investigation. *See* R.C.M. 405(a) discussion; United States v. Roberts, 10 M.J. 308 (C.M.A. 1981); United States v. Hutson, 19 C.M.A. 437, 42 C.M.R. 39 (1970); United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 (1959). *But see* United States v. Connor, 19 M.J. 631 (N.M.C.M.R. 1984).

[18] Because the Article 32(c) investigation is a "further investigation," the investigating officer must be informed of the original investigation in order to understand the relevance of the requested witnesses and, invariably, to understand the significance of questions propounded by the defense.

The time necessary to obtain the record of the prior hearing should normally be relatively short. Regardless, for speedy trial purposes, the loss of time in obtaining the transcript should be insignificant. Rare is the case where either trial counsel or defense counsel would consider going to court without having read prior sworn testimony of witnesses regarding the same subject matter in a related investigation.

[19] *See* United States v. Thomas, 7 M.J. 655, 657–58 (A.C.M.R. 1979) (the Article 32 investigation is designed to provide the military accused with the same or better opportunity than is enjoyed by a civilian accused to have the accusations thoroughly investigated prior to trial).

[20] *See* United States v. Finch, 22 C.M.R. 698, 704 (N.B.R. 1956). In *Finch*, an investigation was conducted prior to preferral of charges. The accused never demanded further investigation pursuant to Article 32(c). During trial, the defense objected to introduction of the testimony of two witnesses who testified at the investigation, but were unavailable at the time of trial. The Navy Board of Review found that the statements would be admissible if the requirements for qualified counsel were met.

[21] *See also* United States v. Gandy, 9 C.M.A. 355, 26 C.M.R. 135, 138 (1958); Courtney v. Williams, 1 M.J. 267, 271 n.13 (C.M.A. 1976).

the preliminary investigation could only be used as a substitute for the Article 32(b) investigation if military charges are preferred against the accused after the civilian preliminary hearing is complete. Accordingly, it pays for the prosecution to await the outcome of the preliminary hearing before taking formal action.[22]

The term "investigation" is intentionally vague. As demonstrated by the legislative history of the UCMJ, Congress sought to ensure that a probable cause inquiry was conducted at some time prior to referral of the charges to a general court-martial: "Subdivision (c) is added to provide for a case where a court of inquiry or other investigation has been held wherein the accused was afforded the rights required by sub-division (b)."[23] Congress, however, sought to ensure that the investigation itself did not become a burdensome technicality.[24] Accordingly, where the purpose of the Article 32(b) investigation has been served by a previously conducted investigation, the purpose of protecting the accused against unwarranted charges has been served, and no further benefit accrues to the government by conducting the Article 32(b) investigation.

The allowance for additional investigation when demanded by the accused is consistent with congressional desire to keep the preliminary proceedings to the minimum required while protecting the rights of the accused.[25] Therefore, unless the accused demands further investigation, a previously made determination as to probable cause is sufficient. Clearly, the accused has a strong motivation to contest findings of probable cause made on insufficient evidence. The accused has equally strong motivation to present evidence in extenuation and mitigation where the possibility exists that the charges would be referred to trial by special or summary court-martial.

Congress, however, did not seek to limit the prior investigations to strictly military investigations. Instead, the focus is upon the rights of the accused. During congressional hearings on the UCMJ, the Article 32(b) investigation was compared to a state preliminary hearing, as indicative of the purpose and nature of the proceedings.[26] Accordingly, there is no reason a state preliminary hearing that guarantees the same rights as Article 32(b) should not be a satisfactory substitute. As in Example 2, so long as the accused enjoys the same substantial rights as he would in an Article 32(b) investigation, the burden of the government is met and the onus is upon the accused to demand further investigation.

Presence at the Investigation

Consistent with the intent to provide a probable cause determination with some right to discovery, Congress requires that, normally, the accused is entitled to be present at the Article 32(b) investigation.[27] Similarly, Congress requires that the accused must have been present at the prior investigation.[28] This prevents the use of Article 32(c) as a subterfuge, and ensures discovery rights.

This requirement, however, prevents the use of state or federal grand jury investigations as a substitute for Article 32(b) investigation. Because the accused at a grand jury investigation has no right to be present, cross-examine witnesses, or present matters in his own defense, he lacks the substantial rights he enjoys during the Article 32(b) investigation.

The Rights of the Accused

In addition to the right to be present. Article 32(b) gives the accused the right to be assisted by counsel, the right to cross-examine witnesses, and the right to present evidence on his own behalf.

The first right is to be represented by counsel.[29] If the accused was represented by counsel, either appointed or independently obtained, at the "prior" hearing, then the purpose of the counsel requirement—to ensure the accused has assistance in exercising his rights—has been met. No further inquiry is necessary. Absence of counsel, however, does not end the inquiry.

Where the prior investigation was a military proceeding, the inquiry is simple: Did pertinent regulations[30] provide for representation by counsel and was the accused informed of that right? If the answer to this question is in the negative, the "prior" investigation cannot be used as a substitute for the Article 32(b) investigation. Where the prior investigation was a civilian preliminary hearing, a similar inquiry is made: Was the accused ineligible for appointed counsel or did he refuse counsel? If the lack of appointed counsel is due to ineligibility (*i.e.*, lack of indigency), the requirements for representation by counsel have not been met, and the prior investigation cannot be used as a substitute for the Article 32(b) investigation. Lack of counsel may, however, be due to the obstinacy of the accused, in which case the record will normally reflect that the accused was informed

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[22] The prosecution may also benefit from observing the witnesses during the preliminary hearing.

[23] *Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 994 (1949) [hereinafter *Hearings*]; S. Rep. No. 486, 81st Cong., 1st Sess. 16 (1949); *see also Gandy*, 9 C.M.A. at 359, 26 C.M.R. at 139 (formal investigation into the loss of property from ships stores was of a type envisioned by Congress in drafting Article 32(c)).

As to courts of inquiry, *see* UCMJ art. 135; Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice, paras. 10–1 to 10–12 (1 July 1984).

[24] S. Rep. No. 498, *supra* note 23, at 16–17; *accord* UCMJ art. 32(d).

[25] The drafters of the UCMJ recognized that the Article 32(b) investigation served a beneficial, albeit secondary, purpose in allowing the accused a degree of discovery:

> This I should say goes further than you usually find in a proceeding in a civil court in that not only does it enable the investigating officer to determine whether there is probable cause . . . but it is partially in nature of a discovery for the accused in that he is able to find out a good deal of the facts and circumstances which are alleged to have been committed which by and large is more than the accused in a civil case is entitled to.

Hearings, supra note 23, at 997 (testimony of Mr. Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense).

[26] *Id.*

[27] UCMJ art. 32(b); *see* R.C.M. 405(f).

[28] UCMJ art. 32(c).

[29] Article 32(b) references the right to have legally qualified counsel as defined in Article 38.

[30] E.g., AR 15–6, para. 5–6.

of the right to counsel[31] and his desire not to seek counsel. Although problematic, the preliminary hearing should serve as an adequate substitute for the Article 32(b) investigation; it is a *right* and not a *requirement* to have representation.

The most likely occurrence, however, is that counsel, either appointed[32] or individually obtained, will be present. It should be remembered, however, that it is the existence of the right, not the soldier's election, which is significant.

Same Subject Matter

Article 32(c), by its terms, requires only that the subject matter of the pending military charges be the same as in the prior investigation. This is not to say the purpose of the investigation must be identical to an Article 32(b) investigation. Nor does it imply, in the case of a civilian preliminary hearing, that the state charge must be identical to the military offense.

Procedures for Invoking Article 32(c)

Having decided to utilize Article 32(c), how can the prosecution's goal of saving time and effort best be accomplished? To this question, the Article provides no answers. The only reference in the Article to the procedural aspects of a subsequent investigation is that such an investigation is necessary only when demanded by the accused. In order to achieve the goal of excepting time from accountability for speedy trial purposes, more is required.

First, inform the accused and his counsel, in writing, of the intention to use the prior investigation as a substitute for an Article 32(b) investigation. Attach a copy of the prior investigation[33] to the notice to ensure that the defense is adequately informed of the nature and results of the prior proceedings. Provide a time[34] during which the defense is expected to respond and state that failure to respond within specified time will waive the right to demand further investigation.[35]

The establishment of a time limit, regardless of whether the defense actually responds, effectively forces the defense to either waive further investigation or accept responsibility for delay necessary to conduct the further investigation. If no response is received, the pretrial advice should be prepared and the charges referred to trial. If the defense demands further investigation, the date of its demand effectively stops the speedy trial "clock" for purposes of R.C.M. 707.[36]

If the defense demands further investigation, the burden then falls upon the defense to determine the witnesses to be recalled or new evidence to be produced. If the defense decides to stall, it is at their own expense.[37] But, as with the Article 32(b) investigation, the investigating officer still controls the proceedings and may terminate the hearing and prepare the report when no further relevant evidence is forthcoming.[38]

Conclusion

Use of the Article 32(c) procedure may provide the government with two advantages. First, further investigation may toll the speedy trial "clock," allowing the prosecution to exclude the time required to conduct the investigation from its accountable time under the R.C.M. 707 and *Burton* rules. Second, the prosecution does not bear the burden of establishing probable cause; instead, the defense must establish that the prior determination was erroneous, based upon the "further" investigation.

These advantages, combined with the lack of any additional risk to the prosecution, make Article 32(c) a tool worth considering where the subject matter of the charges has previously been investigated. In particular, this alternative may prove effective where the command seeks to prosecute the accused for off-post offenses.

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[31] *See, e.g.*, Cal. Penal Code § 859 (West 1987).

[32] In most serious offenses, the accused will be incarcerated until completion of the preliminary hearing. As such, he will be in a "no pay status" and, therefore, be entitled to appointed counsel due to indigence. *See* Dep't of Defense Pay Manual, para. 10104 & Table 1-1-2 (1 January 1967) (with Ch. 77). This is particularly true in the case of enlisted soldiers in the lower ranks, who are less likely to have substantial savings.

[33] The record of the civilian preliminary hearing can usually be obtained through the prosecutor's office or from the court reporter.

[34] Three to seven working days normally should be sufficient.

[35] The enforceability of such a time limit is uncertain, but the potential penalty to the accused for testing its enforceability (either loss of the right to demand further investigation or the demonstrated ineffective assistance of his counsel) is usually sufficient to guarantee a response within the required time limit.

[36] *See* R.C.M. 707(c)(3).

[37] *Id.*

[38] *See* R.C.M. 405(g)(1)(B) discussion; Gaydos, *supra* note 3, at 78.

Use of a Clinical Psychologist During Sentencing in Child Abuse Cases

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One of the most difficult decisions in a child sex abuse case is deciding if and when to allow an accused to talk with a clinical psychologist. This normally arises when the accused has decided to enter a guilty plea. The decision to plead guilty can be made for any number of reasons. Normally it is made because the client has already confessed.

Defense counsel will then focus their attention on sentencing. The dilemma is that a defense counsel cannot obtain any expert testimony concerning a clients' rehabilitation potential unless the client is examined and evaluated by a clinical psychologist or psychiatrist. The testimony a defense counsel is looking for is that a client has tremendous rehabilitation potential, that he probably will never commit child sexual abuse again, that the best treatment would be to place him in a trial diversion program, and that he should not be placed in confinement. This type of testimony will be of assistance during sentencing.

The evaluation of a client may not net the desired result, however. During the evaluation and psychological testing a client may relate other acts of misconduct that have not been reported. In addition, he may give the full details of charged offenses, which may indicate the charges are more egregious than the government realizes. In the worst of all scenarios, the clinical psychologist concludes the client is a fixated pedophile who needs to be incarcerated to undergo a long term treatment plan.

Then where does one go? The government may be able to obtain all of this information and turn a major defense witness into the star witness for the government. The information that the client has provided may not be priviliged. In a recent case, the Court of Military Appeals issued an opinion that should be read by any defense counsel defending a child sexual abuse case. In *United States v. Toledo,*[1] the Court of Military Appeals held that a privilege concerning mental examination of an accused[2] did not apply to preclude disclosure of statements made by an accused during a confidential evaluation conducted by a military clinical psychologist who had not been ordered to examine the accused, but rather, had been requested to do so by defense counsel. This is precisely the problem faced by defense counsel. The opinion, written by Judge Cox, gives a good explanation why no privilege exists under the facts of that case. The accused had been charged with one specification of rape, five specifications of indecent assault, and one specification of committing indecent acts on a female under the age of 16. He pleaded not guilty, but was convicted and sentenced to thirty years of confinement. The convening authority suspended confinement in excess of twenty years. During the trial, on rebuttal, the prosecution offered the testimony of a military clinical psychologist who had evaluated the accused. The defense objected to the testimony on grounds of privilege. The defense counsel stated that he had approached the doctor and requested him to evaluate the accused to determine if there were any problems concerning sanity. The defense contended that such an evaluation was protected under Military Rule of Evidence 706.[3] This rule concerns the employment of expert witnesses. There are no privileges contained in the rule that would bar disclosure of anything said to an expert. Over the defense objection, the doctor was allowed to testify concerning certain matters related to him by the accused. Evidence that the defense thought was protected was used to help convict the accused.

So what does this mean to a defense counsel? Are there any existing procedures to protect an accused who cooperates with a clinical psychologist in a child sexual abuse case? If an accused has cooperated within the context of a sanity board the information would be protected. Military Rule of Evidence 302 protects statements made by an accused to a sanity board:

> The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under R.C.M. 706 and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or *during sentencing proceedings.* This privilege may be claimed by the accused not withstanding the fact that the accused may have been warned of the rights provided by Mil. R. Evid. 305 at the examination.[4]

However, how does the defense ask for a sanity board in order to determine the rehabilitative potential of the accused? There may be no other provision in the Manual for Courts-Martial[5] to protect the statements made during the clinical evaluation of a child sexual abuser.

The Military Rules of Evidence recognize no doctor-patient privilege per se.[6] Military Rule of Evidence 501(d) provides: "Notwithstanding any other provision of these rules,

[1] United States v. Toledo, 25 M.J. 270 (C.M.A. 1987).

[2] *See* Mil. R. Evid. 302; Mil. R. Evid. 502.

[3] Mil. R. Evid. 706.

[4] Mil. R. Evid. 302(a) (emphasis added).

[5] Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

[6] *See Toledo,* 25 M.J. at 275.

information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity."[7]

To establish a privilege, defense counsel would have to argue the existence of a privilege under Military Rule of Evidence 501. The general rule states that a person may not claim a privilege with respect to any matter except as required by or provided in the United States Constitution, an Act of Congress, the Uniform Code of Military Justice, or common law privileges generally recognized in federal Courts.[8] The drafters' analysis of Rule 501 specifically declines to recognize any doctor-patient privilege. It states:

> Rule 501(d) prevents the application of a doctor-patient privilege. Such a privilege was considered to be totally incompatible with the clear interests of the armed forces in ensuring the health and fitness for duty of personnel. *See* 1969 Manual paragraph 51c. The privilege expressed in Rule 302, and its conforming manual change in paragraph 121, is not a doctor-patient privilege and is not affected by rule 501(d).
>
> It should be noted that the law of the forum determines the application of the privilege. Consequently, even if a service member should consult with a doctor in a jurisdiction with a doctor-patient privilege for example, such a privilege is inapplicable should the doctor be called as a witness before the court-martial.[9]

So what should a defense counsel do? If an accused cooperates prior to any plea agreement being signed, he runs the risk of having the government up the ante or possibly refuse to agree to any deal whatsoever. This can be absolutely devestating to his case.

Defense counsel generally faces additional pressure because the accused wants to cooperate. Child protective agencies may threaten the accused by telling him that, if he does not cooperate, they will remove his children from the home or have him removed from the home. His refusal to cooperate and tell everything can and sometimes does result in the destruction of the family unit. A defense counsel is sometimes viewed as the obstructionist by the family, child protection agencies, and the government. A defense counsel can spend many hours wondering if he is doing the best thing for his client. It is a very difficult situation.

Ultimately one must remember his role as defense counsel. The defense attorney is tasked to defend the interests of the accused. It cannot be in the accused's best interest to talk and provide evidence that can be used against him. Prior to sending an accused to be evaluated, defense counsel should have a signed plea agreement or, as will be discussed, have a psychologist appointed to assist the defense in preparation of the case. At least, once counsel has a signed plea agreement, the accused cannot be harmed in excess of the deal. Resist all temptations to allow the accused to talk prematurely. Defense counsel should also explain to the accused that he must tell counsel everything before he is evaluated. The defense counsel should know what to expect before any evaluation is performed. It is not unusual for a defense counsel to be shocked when he sees a report that contains grisly details and facts more egregious than he ever expected.

There are several things a defense counsel can do to protect the client's interests. First, advise the client not to talk to anyone about the charges, unless counsel has authorized the discussion. Second, explore the possibility of having an expert appointed to assist the defense, an option outlined in *United States v. Toledo.*[10] After explaining that the statements Toledo made to the clinical psychologist were not protected, Judge Cox stated: "Ironically, there is a rule of evidence that might have permitted appellant to utilize the services of Dr. Rosete without risking disclosure of his statements—the lawyer-client privilege, Mil. R. Evid, 502(a)."[11] Rule 502(a) states:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.[12]

What Judge Cox is suggesting is that the defense may have a way to protect statements under the attorney-client privilege. The representative of the lawyer is defined in the Manual for Courts-Martial as "A person employed by or assigned to assist a lawyer in providing professional legal services."[13] Judge Cox states that the drafters of the rule identified, nonexclusively, paraprofessionals and secretaries as possible representatives of lawyers.[14] There is room to argue that a clinical psychologist could be a representative of the lawyer. In fact, the opinion states emphatically that "the psychiatrist's (psychotherapist's) place on the defense team to 'conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense' of insanity is not established beyond cavil."[15] Arguably this extends to a clinical psychologist used to prepare for sentencing. Defense counsel should use this suggestion and analysis to the advantage of the client.

Before sending a client to be evaluated, a defense counsel should consider requesting the convening authority to designate the doctor as a representative of the attorney for

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[7] Mil. R. Evid. 501(d).

[8] Mil. R. Evid. 501(a).

[9] MCM, 1984, Mil. R. Evid. 502 analysis at A22-35.

[10] 25 M.J. 270 (C.M.A. 1987).

[11] *Id.* at 275.

[12] Mil. R. Evid. 502(a).

[13] Mil. R. Evid. 502(b)(3).

[14] 25 M.J. at 275; *see* Mil. R. Evid. 502 analysis at A22-35.

[15] 25 M.J. at 275-76 (citing Ake v. Oklahoma, 470 U.S. 68, 83 (1985)).

purposes of the evaluation. The purpose would be to place the clinical psychologist on the defense team to conduct an appropriate examination and to assist in the evaluation, preparation, and presentation of the defense. Under the rationale expressed in *Toledo*, anything said to the doctor would be privileged, until and unless the doctor testified at the trial.

The third thing that defense counsel can do is place some protections in the pretrial agreement. The accused could agree with the convening authority that he, the accused, will agree to undergo psychological testing and evaluation with the servicing clinical psychologist. The agreement would state that the results of the evaluation would not be disclosed to the prosecution. The report would be disclosed in its entirety to the prosecution, however, if the accused decided to call the doctor as a witness in extenuation and mitigation. There should be no restraint on the doctor or any subsequent doctor from using the medical information for treatment of the accused before or after the trial. The language for this paragraph of the agreement could be tailored from the provisions of Rule for Courts-Martial 705.[16] The following is a sample of such a provision:

> The accused agrees that he will undergo testing and evaluation by Dr. _____, Clinical Psychologist at _____ Army Hospital. I understand this is the first step toward rehabilitation for the offenses to which I have agreed to plead guilty. The convening authority agrees that any report or other information concerning the evaluation of myself will not be disclosed to any person other than my defense counsel or myself. In the event that I introduce any testimony from Dr. _____, or any evidence from the report of evaluation completed by Dr. _____, the results of the evaluation will be disclosed to the prosecution. The prosecutor may introduce any part of the evaluation into evidence at my trial after I have initially introduced such evidence.

Of course, the convening authority may never agree to the inclusion of any such provision in the pretrial agreement. This is when the defense counsel can earn his money. The defense counsel must be able to convince the convening authority that such a provision is in the best interests of all concerned. Several reasons can support a provision for psychological evaluation. The convening authority can be told that the accused is willing to begin the rehabilitation process immediately, even before trial. This is in the best interests of the accused, the family, the victim, and government. After all, the desire to prosecute is usually couched in terms having the accused incarcerated for treatment. All the defense counsel is asking for is protection against the government attempting to use his client's rehabilitation evaluation against him. Nearly all psychologists who work with child sex offenders agree that acknowledging involvement is the first step toward rehabilitation. In addition, the defense counsel can argue that the willingness to be evaluated will be in the best interests of any victims. The accused may divulge the names of other children who have been abused. This would allow any such children to be identified and provided counseling or assistance to help them. There may be other reasons that support inclusion of a protective paragraph in the pretrial agreement. The message is clear; however, the defense will have to convince the convening authority to accept this paragraph.

Once a paragraph of this nature is included, the defense must have confidence that it is valid and enforceable. Is the paragraph enforceable? In the opinion of this writer, it is. Rule for Courts-Martial 705 b(1) states:

> (b) Nature of agreement. A pretrial agreement may include:
>
> (1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule.[17]

There is nothing in the rule that would prohibit such a provision. Certainly such a provision cannot be said to be contrary to public policy. Moreover, once an accused begins to talk to a clinical psychologist the defense can argue that performance of the pretrial agreement has begun.

Rule for Courts-Martial 705(d)(5) sets forth the provisions for either the accused or government to withdraw from the pretrial agreement. This rule provides protection for the accused in the event the government were to attempt to withdraw from the pretrial agreement after the accused has been evaluated by the clinical psychologist. It states:

> (5) Withdrawal.
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> (A) By accused. The accused may withdraw from a pretrial agreement at any time; however, the accused may withdrew a plea of guilty or a confessional stipulation pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively.
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> (B) By convening authority. The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.[18]

In addition to Rule 705 (d)(5)(B), a defense counsel can argue that the pretrial agreement is enforceable under the ruling of *Shepardson v. Roberts*.[19] In that case, the Court of Military Appeals adopted a detrimental reliance theory to determine whether a plea agreement will be enforced. In other words, if an accused has acted pursuant to a pretrial agreement and if such action is to his detriment, the government may not back out of the deal. In *Shepardson*, a pretrial agreement was accepted by the convening authority, only to be revoked by a new convening authority who assumed command prior to the accused's trial. The accused

[16] MCM, 1984, Rule for Courts-Martial 705 [hereinafter R.C.M.].

[17] R.C.M. 705(b)(1).

[18] R.C.M. 705(d)(5).

[19] 14 M.J. 354 (C.M.A. 1983).

argued that the pretrial agreement should have been enforced because he made incriminating admissions that could be used against him. The Court of Military Appeals rejected this argument, but the court provided interesting language that can be used to argue detrimental reliance in the clinical psychologist situation. The court stated:

> A distinction may also be drawn between the present situation and one in which an accused, relying on a pretrial agreement, has provided detailed information—perhaps in the form of a confessional stipulation—which was not previously available to the Government and would materially aid its case. There, the difficulty of sifting out information otherwise available to the Government for the proof of its case from that which was provided by the accused might support a finding of detrimental reliance. Moreover, we recognize that under such circumstances an accused who has once "let the cat out of the bag" may practically and psychologically be in an inferior position either for plea bargaining or for defending his case.[20]

The Court of Military Appeals also stated that, if an accused does something that would make it more difficult for him or her to plead not guilty at trial, then detrimental reliance has occurred.[21] A defense counsel could certainly argue that an accused has relied to his detriment on the promise of the convening authority when the accused provides information to a clinical psychologist pursuant to a pretrial agreement. Certainly if your client is evaluated by a clinical psychologist, he is providing evidence that could be used to incriminate him. If the convening authority were to attempt to withdraw from the deal after your client was evaluated, the law laid forth in *Shepardson v. Roberts* would apply.

In conclusion, a defense counsel does have the tools at his disposal to protect his or her client when preparing for sentencing in a child sex abuse case. The focus of this article is on sentencing in a guilty plea case, however; the defense must proceed even more cautiously in a contested case. The participation of a clinical psychologist or psychiatrist without the protection of a privilege against the disclosure of the results of the evaluation or of statements made during the examination could be devastating. Child abuse cases can be very difficult; proceed cautiously.

[20] *Id.* at 358.

[21] *Id.*

Trial Judiciary Note

Recent Developments in Instructions

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Instructions and the law relating to them are of continuing importance to the trial process. This article is a review of some of the more important recent developments with respect to instructions.[1]

Offenses

An recurring trial issue is whether the military judge must instruct that there can be no conviction unless at least two-thirds of the members agree on the same theory of criminal liability. The Court of Military Appeals resolved the issue in *United States v. Vidal.*[2]

Vidal and an accomplice kidnapped the victim and took her to a wooded area. The accomplice had sexual intercourse with the victim and then Vidal did so. At trial, the military judge instructed that the accused could be convicted of rape as an aider and abettor or as an actual perpetrator. He did not instruct that the theories of liability should be considered separately. The court affirmed. It held that as long as two-thirds of the members were satisfied beyond reasonable doubt that the accused was guilty of rape, the finding was proper. It does not matter that the members may not agree on the same theory of criminal liability. *Vidal* has a significance that transcends its facts. It affects instructions in any case where criminal liability may be based on more than one theory. Thus, it applies to cases where the evidence establishes criminal liability as an actual perpetrator, statutory principal,[3] or as a co-conspirator.[4] Similarly, it may apply to robbery cases where criminality is based on force and violence, or by placing the victim in fear;[5] larceny cases in which the wrongful taking, obtaining, and withholding is proscribed;[6] and many assault

[1] For earlier cases, see Green, *Recent Developments in Instructions,* The Army Lawyer, Mar. 1987, at 35.

[2] 23 M.J. 319 (C.M.A. 1987).

[3] Uniform Code of Military Justice art. 77, 10 U.S.C. § 877 (1982) [hereinafter UCMJ].

[4] *See* United States v. Gaeta 14 M.J. 383, 391 (C.M.A. 1983).

[5] UCMJ art. 122.

[6] UCMJ art. 121.

cases in which the theory of liability may be offer or attempt and intent or culpable negligence.[7]

United States v. Pasha[8] concerned the propriety of an instruction regarding the inference that may be drawn from the unexplained possession of recently stolen property. The accused was found in possession of stolen items, one of which was stolen forty-two days previously. He testified that he could not remember committing the offenses. The unexplained possession of stolen property instruction was given,[9] the accused was convicted, and he appealed. He alleged that the instruction was erroneous because it was a mandatory presumption favorable to the prosecution and a comment on the right to remain silent. He also claimed that the property was not recently stolen.

The court affirmed. It held that the instruction was not a mandatory presumption, but that it merely articulated a permissive inference that could be drawn from the evidence. The court also held that the instruction did not violate the privilege against self-incrimination. The court stated, however, that it would have been preferable had the judge also instructed that possession may be explained by other circumstances and evidence independent of the accused's testimony.[10]

The court also rejected the argument that the possession was not recent. It recommended that upon request or when he deems it appropriate, the trial judge should define the term "recent".[11] No such request was made in this case.

Two recent cases highlight the criticality of accurate instructions. In *United States v. Johnson*,[12] the accused was charged with willful injury to a national defense utility, an RF–4 aircraft, in violation of a federal statute.[13] In instructing on the elements the judge stated "The third element is: That by such conduct, the accused willfully injured national defense utility, to wit: that same RF–4 aircraft."[14] By this phrasing, the trial judge essentially instructed the members that the RF–4 was a national defense utility. Whether the aircraft fit within the definition of a national defense utility was a material issue in the case, however. Thus, the members and not the trial judge should have decided that issue. Because the instruction took that issue away from the members it was improper, and the conviction for the offense was set aside.[15]

In *United States v. Clarke*,[16] the accused was charged with the rape of a subordinate in the barracks. The military judge determined that indecent acts with another was a lesser included offense. He instructed that the first element was that, "the accused . . . committed a certain indecent act . . . by engaging in sexual intercourse in the . . . barracks with a military subordinate." The Army court held the instruction was error because it confused fraternization which is based on the relationship of parties with indecency which is based on the nature of the act.[17]

Defenses

Entrapment

In *United States v. Skrzek*,[18] a government agent made repeated visits to the accused in order to purchase heroin. The accused made four heroin sales to the agent in an eleven day period. In a bench trial, the accused was acquitted of the first sale, but convicted of the others. The Army Court of Military Review reversed. It found that the acquittal was probably based on an agency defense,[19] but could have been the result of entrapment. The court found as fact that there had been unlawful inducement with respect to the first sale, and it declared

> [W]hen an innocent person performs a proscribed act solely because of the unlawful inducement of a government agent, and soon thereafter performs a number of similar acts at the request of that same agent, *it seems*

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[7] UCMJ art. 128.

[8] 24 M.J. 87 (C.M.A. 1987).

[9] The instruction is set out in the opinion. *Id.* at 87–88. *See* Dep't of Army, Pam. No. 27–9 Military Judges' Benchbook, para. 3–90 (1 May 1982) (C2, 15 Oct. 1986) [hereinafter Benchbook].

[10] 24 M.J. at 89 n.2. The preference has its roots in Barnes v. United States, 412 U.S. 837 (1973). In *Barnes*, the trial judge instructed on the inference that may be drawn from the unexplained possession of recently stolen property. He instructed, inter alia "In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of Constitutional rights the accused need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence independent of any testimony of the accused."

When indicating the preferable instruction, the Court of Military Appeals cited only the latter sentence. It would be better practice, however, to incorporate both sentences into the unexplained possession of recently stolen property instruction.

[11] Once, again, the court cited the *Barnes* instruction as a model and set out the applicable portion in its opinion. Essentially, the term "recent" is a relative one and depends on the facts and circumstances of each case. The full instruction on the unexplained possession of recently stolen property given in *Barnes* is set out in the opinion of the Supreme Court. 412 U.S. at 841 n.3.

[12] 24 M.J. 101 (C.M.A. 1987).

[13] 18 U.S.C. § 2155 (1982).

[14] 24 M.J. at 108.

[15] During the trial, the judge took judicial notice of the applicable federal statutes and the definition of national defense utility and read the statute and definition to the members. In his instructions, he did not reiterate the definition of national defense utility and did not define "national defense," "national defense material," or "troops". In his opinion, Chief Judge Everett noted these omissions and indicated that these omissions were error.

The terms "national defense," national defense material," and "troops" have meaning to a military court, and unless their definition is other than what would be normally understood by military personnel, it is difficult to understand why any definition was necessary. Also, as the statutory definition of "national defense utility" was read to the members, it should have been unnecessary to repeat it.

[16] 25 M.J. 631 (A.C.M.R. 1987).

[17] The court left for another day the question of whether consensual sexual intercourse in private is an indecent act.

[18] 47 C.M.R. 314 (A.C.M.R. 1973).

[19] *Id.* at 317; *see* United States v. Fruscella, 21 C.M.A. 26, 44 C.M.A. 80 (1971).

fair to hold that the influence of the prior unlawful inducement should be presumed to continue until the prosecution establishes the contrary.[20]

In *United States v. Jacobs*[21] the accused made two sales of LSD to a government agent and subsequently transferred marijuana to the agent. His defense was entrapment, and citing *Skrzek*, he requested that the trial judge instruct that the initial entrapment with respect to the LSD sales is presumed to continue to include the marijuana sales unless the prosecution establishes the contrary. The judge refused, "ruling that there is no presumption that a person entrapped into offenses involving LSD would also be entrapped into subsequent offenses involving marijuana".[22] The Army court held that the refusal was error. Citing *Skrzek*, it declared that the requested instruction should have been given.

The latest case involving this issue is *United States v. Jursnick*.[23] The accused was charged with distribution of cocaine on consecutive days. He claimed entrapment, was acquitted of the first distribution, and convicted of the second. On appeal, he argued that the failure of the trial judge to give a presumption of continuing entrapment instruction was error.[24] The Army court affirmed. It found that the military judge gave detailed and factually tailored entrapment instructions for each offense. Accordingly, it held that a continuing entrapment instruction was not required. Moreover, it stated that "we do not endorse the wisdom of an instruction based on a presumption of continuing entrapment in most situations."[25]

The decision is sound. The language in *Skrzek* was written in the context of an appellate court exercising its fact finding authority. As such, it had limited application and was not intended to be transformed into an instructional requirement as *Jacobs* mandated. The accused is entitled to factually tailored entrapment instructions that should reference the relationship of the government conduct and the various charged or uncharged offenses.[26] When such instructions are given, the members are fully advised of the entrapment issues and further instructions involving a presumption of continuing entrapment are unnecessary.[27]

In *United States v. Eckhoff*,[28] the Navy-Marine Corps Court of Military Review joined the Army[29] and Air Force[30] courts in holding that an instruction that declares that a profit motive vitiates an entrapment defense is error.

Alibi

In *United States v. Salter*,[31] the issue was whether the accused was present at a particular time on the date of the alleged offense. The military judge instructed as to alibi,[32] but stated that if the accused was present on the date in question,[33] the defense of alibi did not exist. Because the issue was what time the accused was present and not what date, the instruction was erroneous. In his instructions, however, the trial judge summarized the evidence and identified time as the crucial issue. Therefore, the error was not prejudicial.[34]

In *United States v. Brooks*,[35] the evidence established that if the crime occurred it did so in the female latrine of a gymnasium. The accused admitted he was in the gymnasium, but not in the female latrine. The trial judge refused to give an alibi instruction because he concluded that the scene of the crime was the gymnasium. The Court of Military Appeals reversed. It found that the judge's view of alibi was too restrictive because for alibi "distance is immaterial so long as it is sufficient to show that the defendant was too far away to have committed the offense."[36]

Voluntary Intoxication

In its first term, the Court of Military Appeals held that voluntary intoxication is not a defense to unpremeditated murder and therefore there is no requirement to instruct that voluntary intoxication is a defense.[37] In *United States*

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[20] 47 C.M.R. at 317 (emphasis added).

[21] 14 M.J. 999 (A.C.M.R. 1982).

[22] *Id.* at 1001.

[23] 24 M.J. 504 (A.F.C.M.R.), *petition denied*, 25 M.J. 251 (C.M.A. 1987).

[24] No request for such an instruction was made at the trial.

[25] 24 M.J. at 508.

[26] In *Skrzek*, the court was concerned that without a presumption of continuing entrapment, the government could charge only subsequent crimes and not the initial transaction. The court feared that such a situation would impair the accused's ability to present an entrapment defense. 47 C.M.R. at 318. The court's concern is misplaced. If an earlier transaction was the beginning of a series of criminal acts by the accused and that transaction was caused by government action and reasonably related to the subsequent acts, evidence concerning the earlier transaction is admissible to show entrapment. The test of admissibility is not what the government charged, but rather what is relevant. Accordingly, to the extent that the need for a presumption of continuing entrapment is based on this erroneous concern of the court, it is without foundation.

[27] *See generally* United States v. Bailey, 21 M.J. 244 (C.M.A. 1986). The Benchbook does not contain a presumption of continuing entrapment instruction.

[28] 23 M.J. 875 (N.M.C.M.R. 1987).

[29] *See* United States v. Myers 21 M.J. 1007 (A.C.M.R. 1986).

[30] *See* United States v. O'Donnell, 22 M.J. 911 (A.F.C.M.R. 1986).

[31] 24 M.J. 843 (A.F.C.M.R. 1987).

[32] The instruction is set out in the opinion. 24 M.J. at 845.

[33] *See generally* Benchbook, para. 5–13.

[34] *Salter* and *Jursnick* provide a lesson for judges that summarizing and marshaling the evidence for both sides, even though not mandatory and requiring more effort, can prevent reversal of cases with apparently defective instructions. *See generally* United States v. Nickoson, 15 C.M.A. 340, 35 C.M.R. 312 (1965); United States v. Smith, 13 C.M.A. 471, 33 C.M.R. 3 (1963). *But cf.* United States v. Grandy, 11 M.J. 270 (C.M.A. 1981).

[35] 25 M.J. 175 (C.M.A. 1987).

[36] *Id.* at 179; *cf.* United States v. Fisher, 24 M.J. 358 (C.M.A. 1987).

[37] United States v. Roman, 2 C.M.R. 150 (C.M.A. 1952).

v. Tilley,[38] the court cast doubt on that established doctrine.

Tilley was charged with premeditated murder. His defense was voluntary intoxication, that he was an alcoholic, and that he had an adjustment disorder. With respect to the lesser included offense of unpremeditated murder, the defense requested an instruction stating that a combination of voluntary intoxication and his existing mental condition may cause the accused to lack the capacity to form the intent to kill, or inflict great bodily harm.[39] The judge refused the request and instructed that voluntary intoxication by itself is not a defense to unpremeditated murder. He did instruct, however, that voluntary intoxication is a factor to be considered in determining whether the accused had the ability to form the intent required for unpremeditated murder.

On appeal, the Court of Military Appeals affirmed a finding of guilty of unpremeditated murder. Furthermore, it indicated that possibly voluntary intoxication was now a defense to unpremeditated murder, but stated that the prudent instructions of the trial judge made it unnecessary to resolve the issue.

The court's opinion is disquieting. It praises a trial judge for instructions that could be viewed as inconsistent. Moreover, it raises the question of whether a long settled legal doctrine,[40] that voluntary intoxication is not a defense to unpremeditated murder, may not now be settled.[41] Once it raises the question, it puts off the resolution until another day. As a result, trial judges are not given the guidance they and the legal system deserve.

Mental Responsibility

In November 1986, Article 50a was added to the Uniform Code of Military Justice.[42] The new statute provides that lack of mental responsibility is an affirmative defense and places the burden of proving lack of mental responsibility by clear and convincing evidence upon the defense. Placing the burden of proof on the defense is a new concept in military law. Previously, when any affirmative defense was raised by the evidence, the government was required to prove beyond reasonable doubt that the defense did not exist.[43] Because of this new concept it may be anticipated that the defense, claiming unconstitutionality, will request military judges to reject the new allocation of the burden of proof and instruct as they have done in the past with respect to all affirmative defenses.

A review of the law establishes that such a defense position should be rejected. In *Davis v. United States,*[44] the Supreme Court held in a federal prosecution that when the issue of lack of mental responsibility is raised, the government has the burden of proving beyond reasonable doubt that the accused was mentally responsible. Fifty-seven years later in *Leland v. Oregon,*[45] the Supreme Court was confronted with an Oregon statute that placed the burden of proving insanity beyond reasonable doubt upon the defense. The Supreme Court distinguished *Davis,* holding that it announced only a rule of procedure applicable in federal courts and not a constitutionally based doctrine.[46] The court then upheld the Oregon statute.

LeLand v. Oregon has continually been affirmed.[47] The latest Supreme Court case involving the allocation of the burden of proof is *Martin v. Ohio.*[48] There, an Ohio statute placed on the defense the burden of proving an affirmative defense by a preponderance of the evidence. The Court upheld the constitutionality of the statute and specifically affirmed the continuing validity of *Leland v. Oregon.* Accordingly, it is clear that the allocation of the burden of proof in Article 50a is constitutional and any defense request to instruct in a manner contrary to that burden should be rejected.[49]

Article 50a also provides that mental disease or defect not amounting to lack of mental responsibility shall not constitute a defense.[50] This provision was intended to eliminate partial mental responsibility as a defense.[51] There is still a question, however, whether psychiatric and psychological evidence not amounting to lack of mental responsibility may be presented to negate the existence of specific intent or knowledge if either is an element of the charged offense.

Because Article 50a is intended to have the same interpretation as the federal insanity defense statute,[52] federal

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[38] 25 M.J. 20 (C.M.A. 1987).

[39] The lesser included offense of unpremeditated murder was placed in issue by evidence.

[40] *See* United States v. Ferguson, 17 C.M.A. 441, 38 C.M.R. 239 (1968); Manual for Courts-Martial, United States, 1984, Part IV, para. 43d(3)(c) [hereinafter MCM, 1984].

[41] The court cited United States v. Vaughn, 23 C.M.A. 343, 49 C.M.R. 747 (1975), as its authority. *Vaughn* involved the issue of a mental condition not amounting to lack of mental responsibility (partial mental responsibility) as a defense to unpremeditated murder, a matter clearly distinguishable from voluntary intoxication. Indeed, Judge Ferguson clearly distinguished the concepts in *Vaughn.* The court also cited United States v. Thomson, 3 M.J. 271 (C.M.A. 1977), as casting some doubt on the long settled doctrine. *Thomson,* however, involved robbery, a crime for which voluntary intoxication has long been recognized as a defense.

[42] National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986).

[43] *See* MCM, 1984, Rule for Courts-Martial 916(b) [hereinafter R.C.M.].

[44] 160 U.S. 499 (1895).

[45] 343 U.S. 790 (1952).

[46] *Id.* at 798-99.

[47] *See, e.g.,* Jones v. United States, 463 U.S. 354, 368 n. 17 (1983); Patterson v. New York, 432 U.S. 197 (1977); Rivera v. Delaware, 429 U.S. 877 (1976).

[48] 107 S. Ct. 1098 (1987).

[49] *See generally* United States v. Freeman, 804 F.2d 1574 (11th Cir. 1986); United States v. Amos, 803 F.2d 419 (8th Cir. 1986).

[50] UCMJ art. 50a(b).

[51] R.C.M. 916(k) analysis.

[52] *See* R.C.M 916(k) analysis; H.R. Rep. No. 718, 99th Cong., 2d Sess. 225 (1986). Except for language unique to military practice and a prohibition on opinion evidence as to mental responsibility, Article 50a and the federal statute, 18 U.S.C. § 17, are identical.

court decisions interpreting this provision are of significance to military practitioners. In *United States v. Frisbee,*[53] the court held that the "mental disease or defect does not otherwise constitute a defense" clause only applies to the defense of diminished capacity. It does not render inadmissible any evidence tending to negate specific intent.[54] When such evidence is presented, the trial judge should instruct that the evidence shall only be considered on the issue of specific intent.[55]

In *United States v. Pohlot,*[56] the Third Circuit conducted an exhaustive examination of this clause. It found that the federal insanity statute does not prohibit the introduction of evidence which negates specific intent or knowledge which is an element of the crime charged. Furthermore, when such evidence is presented, the trial judge should instruct that the evidence is only to be considered on the element of intent or knowledge in issue.

Nothing in Article 50a specifically prohibits the admissibility of psychiatric or psychological evidence which would tend to negate the existence of the statutory element of specific intent or knowledge. The Manual for Courts-Martial prohibits the introduction of such evidence.[57] This provision was based in part, however, upon the district court's decision in *United States v. Pohlot.*[58] The reasoning of that court was rejected by the Third Circuit. Moreover, the Manual provision may well violate the accused's right to due process of law which protects the right to present evidence.[59] Accordingly, the better course is to permit such evidence and to instruct that such evidence may only be considered on the relevant statutory element of knowledge or intent.

In *United States v. Hargrove,*[60] a case involving mental responsibility under the former military standard,[61] the judge instructed, inter alia, "you may consider that the general experience of mankind is that most people are sane."[62] At trial and on appeal, the defense objected to this instruction claiming that it was in effect a presumption of sanity. The court rejected the argument and affirmed. It held that the instruction was merely a reference to common sense and experience and not an evidentiary presumption.

The Manual for Courts-Martial provides that the accused is presumed to be mentally responsible until the accused establishes that he is not.[63] This presumption is not statutorily based but represents an interpretation of Article 50a.[64] As presumptions against the accused in criminal cases are strongly disfavored,[65] it appears wise to not instruct members of this presumption.

Evidence

Ordinarily, the accomplice testimony instruction[66] need be given only upon request.[67] If the testimony of an accomplice—that is, one who is culpably involved in an offense with the accused[68]—is virtually the entire case[69] or is of vital[70] or pivotal[71] importance to the prosecution, the instruction must be given sua sponte.

In *United States v. Jordan,*[72] the Navy-Marine Corps court cast doubt upon the continuing validity of the sua sponte requirement. It took note of the Court of Military Appeals' new definition of plain error as set forth in *United States v. Fisher.*[73] Based on *Fisher,* the court concluded that, absent a request for an accomplice testimony instruction, the failure to so instruct would not justify reversal.[74]

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[53] 623 F. Supp. 1217 (N.D. Cal. 1985).

[54] Frisbee was charged with premeditated murder.

[55] *Accord* United States v. Gold, 661 F. Supp 1127 (D.D.C. 1987).

[56] 827 F.2d 889 (3d Cir. 1987).

[57] R.C.M. 916(k)(2).

[58] R.C.M. 916(k) analysis.

[59] *See, e.g.,* Rock v. Arkansas, 107 S. Ct. 2704 (1987); Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967); United States v. Gipson, 24 M.J. 246 (C.M.A. 1987).

[60] 25 M.J. 68 (C.M.A. 1987).

[61] *See* United States v Frederick, 3 M.J. 230 (C.M.A. 1977).

[62] 25 M.J. at 71.

[63] R.C.M. 916(k)(3)(A).

[64] Although the burden of proof is on the defense, it does not necessarily follow that there must be a presumption of sanity that favors the prosecution. The statute may properly be read as placing the parties in equipoise rather than giving one side, the prosecution, a distinct advantage. Under this interpretation, to prevail the defense would still be required to meet its burden but would not have to overcome an additional hurdle.

[65] *See* Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979); Barnes v. United States, 412 U.S. 837 (1973); United States v. Pasha, 24 M.J. 87 (C.M.A. 1987).

[66] Benchbook, para. 7–10.

[67] United States v. Lell, 16 C.M.A. 161, 36 C.M.R. 317 (1966); United States v. Stephen, 15 C.M.A. 314, 35 C.M.R. 286 (1965); United States v. Schreiber, 5 C.M.A. 602, 18 C.M.R. 226 (1955).

[68] United States v. Garcia, 22 C.M.A. 8, 46 C.M.R. 8 (C.M.A. 1972).

[69] *Stephen,* 15 C.M.A. at 316, 35 C.M.R. at 288.

[70] *Lell,* 16 C.M.A. at 166, 36 C.M.R. at 322.

[71] United States v. Gilliam, 23 C.M.A. 4, 6, 48 C.M.R. 260, 262 (1974); United States v. Adams, 19 M.J. 996, 998 (A.C.M.R. 1985); United States v. Young, 11 M.J. 634, 636 (A.F.C.M.R. 1981).

[72] 24 M.J. 573 (N.M.C.M.R. 1987).

[73] 21 M.J. 327 (C.M.A. 1986) (In order to constitute plain error, the error must not only be obvious and substantial, but it must also have had an unfair prejudicial impact on the jury's deliberations.). *Id.* at 328.

[74] "In light of Fisher we doubt that failure to give a *sua sponte* instruction on accomplice testimony where the testimony is uncorroborated and the accomplice impeached would be plain error today. Such an omission does not rise to the level of plain error as defined in *Fisher.*" 24 M.J. at 576.

Another panel of the same court of military review, writing less than two weeks after *Fisher* was decided, took note of *Fisher* and determined that it did not affect the sua sponte instructional requirement.[75]

The sua sponte instructional requirement for accomplice testimony has been military law for more than two decades. It was adopted because of the recognition that such testimony is crucial. Because it is crucial, it is necessary to inform the members of the dangers inherent in such testimony. *Fisher* has not diminished the criticality of the testimony or its dangers. Furthermore, *Jordan* does not hold that the accomplice testimony instruction should not be given sua sponte. It merely states that automatic reversal will not result from the failure to so give it. Accordingly, *Jordan* does not ease the trial judge's responsibility to instruct. If anything, *Jordan* places an added burden on the defense counsel to request the accomplice testimony instruction in all cases to which it is applicable.

Two recent Court of Military Appeals cases establish that curative instructions are the remedy when improper information is brought to the attention of the members. In *Burtt v. Schick,*[76] the accused was charged with conspiracy and rape. The alleged accomplice was immunized and testified for the prosecution. On cross-examination, he was asked if he had been sentenced to confinement for one year and a bad-conduct discharge.[77] The military judge declared a mistrial.[78] The court held this was error. "An instruction to disregard the improper question would likely have sufficed to rectify any problem."[79]

In *United States v. Garrett,*[80] the trial counsel elicited information that the accused had terminated a criminal investigation interview and had asked to see a lawyer.[81] Immediately after a recess, the military judge, citing the accused's constitutional privileges, forcefully instructed the members to disregard the information.[82] He repeated the instruction during his findings instructions. The court concluded that the military judge properly handled the situation.

In *United States v. Neeley,*[83] the court considered a limiting instruction when proper information is presented.[84] In rebuttal to an insanity defense, a government psychologist testified that the accused intentionally attempted to establish a non-existing psychological condition and that other psychologists agreed with her opinion. Assuming that such testimony was proper,[85] it could only be considered to show the basis of the witness' opinion.[86] Under those circumstances, "the military judge should give a limiting instruction concerning the appropriate use of this type of testimony."[87] Such an instruction must be requested, however, and without a request, the failure to give such an instruction is not plain error.

Sentencing

One of the classic methods[88] of cross-examining a character witness is to ask "do you know" questions.[89] These questions often make reference to the accused's uncharged misconduct. Because the questions examine the witness' knowledge and basis of the testimony, however, they are permitted.[90] When such questions are asked on findings, it is mandatory that the judge instruct on the manner in which the members may consider the questions and answers.[91]

With respect to sentencing, the rules are different. The general rule is that once uncharged misconduct is properly introduced in evidence, it may be considered in determining an appropriate sentence.[92] Generally, no limiting instruction is required.[93]

Two recent cases involved the use of "do you know" questions on sentencing and the instructional requirements associated with those questions. In *United States v. Kitching,*[94] a defense character witness was improperly[95] asked

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[75] United States v. Oxford, 21 M.J. 983, 987 (N.M.C.M.R. 1986).

[76] 23 M.J. 140 (C.M.A. 1986).

[77] The question was not answered.

[78] The mistrial was declared because the military judge believed information that would taint any sentence was introduced. Because findings were not affected, a mistrial after findings would have been more appropriate. 23 M.J. at 142.

[79] *Id.*

[80] 24 M.J. 413 (C.M.A. 1987).

[81] The judge determined that intentional misconduct had not occurred.

[82] The instruction is set out in the opinion. 24 M.J. at 417.

[83] 25 M.J. 105 (C.M.A. 1987).

[84] *See* Mil. R. Evid. 105.

[85] If the prosecution was merely trying to smuggle in hearsay, the evidence was improper. *See* United States v. Stark, 24 M.J. 381 (C.M.A. 1987).

[86] Mil. R. Evid. 703.

[87] 25 M.J. at 107.

[88] *See generally* Michelson v. United States, 335 U.S. 469 (1948).

[89] It does not matter if the questions are phrased "did you know" or "have you heard."

[90] *See generally* United States v. Donnelly, 13 M.J. 79 (C.M.A. 1982).

[91] United States v. Pearce, 21 M.J. 991 (A.C.M.R. 1986).

[92] United States v. Worley, 19 C.M.A. 444, 42 C.M.R. 46 (1970); R.C.M. 1001(f)(2)(A).

[93] Prior to 1969, a limiting instruction was required. *See* United States v. Turner, 16 C.M.A. 80, 36 C.M.R. 236 (1966).

[94] 23 M.J. 601 (A.F.C.M.R. 1986).

[95] It was clear from the examination that the witness was only testifying as to duty performance. Thus, questions relating to general good character were irrelevant.

"do you know" questions which referenced uncharged misconduct.[96] The witness indicated no knowledge of the misconduct. Subsequently, the defense counsel argued that no evidence of uncharged misconduct had been introduced. Trial counsel then stated, within the hearing of the members, that the defense counsel "knows full well" that the government was prohibited from presenting such evidence.[97] No objection and no request for a limiting instruction was made. The military judge did not instruct on the limited use of the "did you know" questions; nor did he instruct regarding the trial counsel's comment. The court held that while a limiting instruction need not always be given, the errors in this case amounted to "gratuitous character assassination."[98] Accordingly, the failure to instruct was prejudicial.

In *United States v. Pauley,*[99] a defense character witness was asked if he knew of numerous acts of uncharged misconduct committed by the accused.[100] He said he did not. During his instructions, the military judge made reference to the uncharged misconduct and stated "you may consider this evidence for its value, if any, in determining the rehabilitation potential of the accused."[101] The instruction was erroneous because the military judge indicated that evidence of uncharged misconduct was before the court. The uncharged misconduct was only mentioned by the trial counsel in his questions. Because questions are not evidence, the judge's reference to their contents as evidence was improper. The court held that, notwithstanding the failure of the defense to object, plain error occurred.[102]

The Manual for Courts-Martial provides that evidence of any mental impairment or deficiency of the accused may be considered on sentencing.[103] In *United States v. Yanke,*[104] the court considered the failure of the military judge to instruct that psychiatric testimony presented on the merits should be considered on sentencing. No request for such an instruction was made, nor was there an objection to the failure to give such an instruction.[105] The court held the failure to give the instruction to be non-prejudicial.

In *United States v. Needham,*[106] the Court of Military Appeals considered the propriety of admitting, on sentencing, extracts of Drug Enforcement Administration (DEA) publications concerning the effects of certain drugs.[107] The court acknowledged the relevance of such publications, but expressed doubts as to the vehicle for their admissibility. Eventually, it found that if their admission was error, it was harmless.

United States v. Eads[108] is a follow on case to *Needham. Eads* provides guidance for the military judge in the event he admits DEA or similar materials. The military judge must instruct that the publication is intended to provide information concerning the nature and effect of the use of a particular substance; that the publication does not purport to describe the drug abuse engaged in by the accused; and that with respect to the accused's abuse, the members should consider the other evidence in the case.

The Air Force court considered the often encountered question of the collateral consequences of a particular sentence in *United States v. Black.*[109] One of the members asked "[W]here will the accused's pay go if it's not reduced to zero?" The judge instructed that "one is in a pay status and receiving pay unless pay is forfeited."[110] The adjudged sentence did not include forfeitures, but presumably included confinement.[111] The court set aside the sentence and authorized a rehearing. It found that the members might have been willing to adjudge a lengthy period of confinement while under the belief that the accused would be paid while in confinement, thereby sparing the family complete financial ruin.[112] Because enlisted personnel are only entitled to pay until the expiration of their enlistment or execution of a discharge, however, the instruction was misleading.

There is no template to employ when deciding which collateral consequences the members are entitled to know and which they should not be told. Any time a question of collateral consequences of a particular sentence is raised, however, before answering the military judge should consider how the answer would affect the sentence. To the extent that the answer would have an adverse affect on the accused, it is increasingly likely that the information should not be provided.

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[96] The misconduct included a letter of reprimand for dishonorable behavior, an assault upon a female noncommissioned officer by ripping off her blouse, and sleeping with the wife of a noncommissioned officer. 23 M.J. at 603.

[97] *Id.* at 606. Obviously, the comment should have been made at a side bar conference or in an Article 39(a) session.

[98] *Id.*

[99] 24 M.J. 521 (A.F.C.M.R. 1987).

[100] The relevant portion of the transcript is set out in the opinion.

[101] 24 M.J. at 523.

[102] A rehearing on sentence was authorized.

[103] R.C.M. 1001(f)(2)(B). No distinction is made between evidence offered on the merits and that presented after findings.

[104] 23 M.J. 144 (C.M.A. 1987).

[105] A form instruction is provided in the Benchbook, para. 6–8.

[106] 23 M.J. 383 (C.M.A. 1987).

[107] The publications are set out in an appendix to the opinion.

[108] 24 M.J. 919 (A.F.C.M.R. 1987).

[109] 24 M.J. 600 (A.F.C.M.R. 1987).

[110] *Id.* at 602.

[111] The court did not set out the adjudged sentence in its opinion.

[112] The accused was found guilty of sexual offenses involving his daughter. Often in these types of cases, forfeitures are not adjudged in order not to further harm the family.

Court-Martial Transcript Pages

How many transcript pages in the average record of trial? When that question was asked of the Clerk of Court recently, the USALSA Information Resources Management Officer devised a program to obtain the information from ACMIS, the Army Court-Martial Management Information System. Looking at cases in which the record had been received during FY 1987, ACMIS reported as follows: Contested general courts-martial averaged 243 transcript pages while contested special courts-martial (with BCD approved) averaged 188 transcript pages. Uncontested general courts-martial averaged 100 transcript pages while uncontested special courts-martial records averaged 84 pages.

The longest transcript received in FY 1987 was the Military District of Washington's 3,628-page *Duncan* case. Fort Belvoir's 1,308-page *Rivera* transcript was the largest among the guilty-plea cases. Of course, the smallest transcripts were the summarized transcripts of general courts-martial resulting in acquittals. Many involved only 3 or 4 pages.

In all, ACMIS said, you who labor in the GCM jurisdiction sent the Clerk of Court 2,179 cases averaging 136.9 pages of transcript per record—a total of 298,360 pages. We are not suggesting you try to improve (increase) this in 1988.

Army Court of Military Review, Calendar Year 1987

The following is a statistical summary of the caseload of the Army Court of Military Review during the period January-December 1987. Similar information for 1986 and 1985 is included for comparison.

	1987	1986	1985
Records received for review	1,949	2,170	2,178
Other cases received	107	128	136
Cases filed at issue	2,161	2,374	2,327
Decisions issued	2,120	2,477	2,545
Published opinions	118	103	124
Opinions not published	372	437	687

We also obtain information monthly as to average filing and decision times. In 1987 guilty-plea cases, the average number of days required to file the Assignment of Errors and Brief on Behalf of Appellant ranged from 48 days in February to 61 days in August. In cases that were contested at trial, the monthly average filing time ranged from 81 to 119 days. The time required for filing the government's answer ranged from 31 to 52 days except that, in cases in which no error had been assigned, the government's pro forma answer was filed within 1 or 2 days.

In cases in which the Army Court of Military Review issued an opinion, the monthly average decision times ranged from 24 days in May to 61 days in November. In cases disposed of by short-form affirmance, the averages were from 9 days (March) to 17 days (November).

Accordingly, it appears that a typical uncontested case in which no appellate issues are raised by counsel or specified by the court may be decided within two to three months after the record is received. A typical contested case in which errors are asserted for appellate consideration may require seven to eight months for briefing and decision.

Contracts Appeals Division—Trial Note

Hindsight—Litigation That Might Be Avoided

Major Edward J. Kinberg
Trial Attorney

This is part of a continuing series of articles discussing ways in which contract litigation might be avoided. The trial attorneys of the Contract Appeals Division will draw on their experiences and share their thoughts on avoiding litigation or developing the facts in order to ensure a good litigation posture.

Problem 1

You are reviewing a solicitation for a supply contract when you notice the contract requires the successful bidder to provide a subcomponent from one of the three sources listed in the contract. You have not seen this type of requirement before and are unsure of what advice to give the procuring contracting officer (PCO) on this matter.

The Solution

This problem involves two separate issues. The first concerns the government's right to require a contractor to purchase subcomponents from a specific source. The second concerns whether the government is warranting that the required sources will supply the controlled part to a successful bidder.

The government may require a contractor to obtain subcomponents from specific sources. It is a good idea, however, to ask the PCO why the government is limiting the sources for the item in question. It may turn out that the Technical Data Package (TDP) for the item has had the limitation in it for twenty years and no one knows why it is still in the contract. If that is the case, the TDP should be reviewed to see if the limitation can be taken out. Removing

the limitation may increase competition for the contract and result in significant cost savings to the government. In addition, removal may avoid an unnecessary delay in delivery or the filing of a claim due to the unavailability of the item. On the other hand, it may turn out that the component is a particularly difficult item to make or may be a proprietary item and only available from the sources listed in the solicitation. If so, it would be appropriate to leave the source control in the solicitation.

The second matter that you must consider is whether the government guarantees the availability of the item from the source shown in the TDP. The answer to this question is a simple yes and no. When the government places a source control in a solicitation it is warranting the listed sources was capable of producing the item at the time the control was put in the TDP. The government is not, however, warranting that the source will sell the item to the successful bidder. Basically, the government is saying to prospective contractors that it wants them to buy the part from a specific source and that, at the time it made the decision to limit the source, it knew the contractor could make the part. The government is not promising the source will sell the item to anyone that wants it; that it will sell small quantities; that it will sell under terms and conditions beneficial to the bidder; or that the source still makes the part. Each prospective contractor must check with the source to see if it still makes the part and that the source will sell the item to it. *See Modular Devices, Inc,* ASBCA No. 33708, 87–2 BCA para. 19,798.

Practice preventive law when reviewing solicitations. If you see a source control in a TDP, find out when the source control was put on the drawing. If it was put in the contract recently, verify that the appropriate individuals ensured that the listed sources were the only ones capable of making the part. If the source control was put on the drawing many years ago, make sure the company is still capable of making the part and that other sources are still unacceptable to the government. If the company is no longer making the part, the government may incur undue expense and delay in obtaining the end product it is purchasing. A little preventive law before the contract is let can avoid an expensive and time consuming claim.

Problem 2

A contracting officer calls and tells you that she has just received a report from her technical advisers that concludes the claim you have been working on has no merit. You have carefully reviewed the contractor's claim, the technical exhibits it submitted in support of its claim, and the applicable case law. You believe the claim has some merit and should be settled. When you express your concerns to the contracting officer, she tells you that she does not care what the contractor's experts say; if her engineers say the claim has no merit she will not give the contractor a penny. What do you do?

Solution

You need to make clear to the contracting officer that she cannot blindly follow the advice of her technical advisors. In *Shirley Contracting Corporation,* ASBCA No. 29848, 87–2 BCA para. 19,759, the board found that a contracting officer's final decision was not substantially justified because the contracting officer had "blindly" accepted an auditor's conclusion that a portion of the claim was not allowable. In *Shirley,* the auditor concluded that the contractor's claim for extended home office overhead was not payable. The contractor's attorney sent the contracting officer a letter citing a recently decided case from the Court of Appeals for the Federal Circuit. The contracting officer ignored the case and denied the claim. In its decision, the board stated: "[W]hen an audit recommendation is challenged, and when legal authorities point the other way, the best interest of the Government would require the contracting officer to look beneath the surface, rather than blindly accepting and adopting recommendations which were based on obviously inadequate and superficial analysis."

While *Shirley* was limited to entitlement to attorneys fees under the Equal Access to Justice Act (EAJA), the same analysis applies to technical issues. In *Shirley,* the Board says that it expects a contracting officer to fully analyze a claim. This seems to be particularly true when a contractor submits technical or legal authority in support of its claim. This does not mean that the claim must be paid in full or in part. It simply means that a contracting officer has a duty to investigate a contractor's position and should only deny a claim after determining that there is no merit to it.

In the example presented above, you should advise the contracting officer to have her engineers study the contractor's technical exhibits and advise her on the validity of the allegations. In addition, you should prepare a list of your own questions for the engineers as well as a summary of the points that must be considered. If, after a full examination of the contractor's contentions, the contracting officer still believes the claim should be denied, a final decision should be issued. While the possibility of losing attorneys fees under the EAJA cannot be eliminated, it can be substantially reduced by a careful evaluation of the contractor's legal and technical contentions.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Administrative and Civil Law Note

Digest of Opinion of The Judge Advocate General

DAJA–ALP 1987/2356 (27–1), 14 September 1987, Constructive Discharge

A soldier's administrative separation in lieu of court-martial, pursuant to Chapter 10, AR 635–200, was void where the prerequisites of Chapter 10 were not met. Charges had been preferred against the soldier for one specification each of breach of restriction and absence without leave (18 days). After consulting with military defense counsel, the soldier requested discharge in lieu of court-martial. The chain of command recommend approval of the request, and the general court-martial convening authority approved the request and directed issuance of a discharge under other than honorable conditions. The charges were never referred for trial by court-martial.

The approval of the Chapter 10 request was improper because the preferred charges did not authorize imposition of a punitive discharge. The aggregate maximum punishment for the offenses with which the soldier was charged was confinement for seven months and forfeiture of two-thirds pay per month for seven months. R.C.M. 1003(d)(3) authorizes the imposition of a punitive discharge when a soldier is charged with two or more offenses neither of which carry a punitive discharge, but which have an aggregate maximum sentence to confinement of six months or more. This escalation clause cannot be used as the basis for a discharge in lieu of court-martial, however, unless the charges have, in fact, been referred for trial by a court-martial empowered to adjudge a punitive discharge. As a result the discharge was void.

Notwithstanding the initially void discharge, a constructive discharge arose because the conduct of both the Army and the soldier, by affirmative acts or inactivity for a substantial period of time, clearly indicated that both parties acquiesced in the discharge. The application of the doctrine of constructive discharge depends upon the specific facts in each case. In this case, the soldier had previously requested discharge from the service, had indicated his dislike of military service, and had asserted that he had enlisted under family pressure. Further, he submitted the request for discharge under Chapter 10, AR 635–200, adding a handwritten statement in support of it.

Finally, he accepted his financial settlement and his discharge. In fact, the soldier is not complaining that the discharge was improper, only that he is dissatisfied with the characterization of service. For its part, the Army processed the soldier's request for discharge with favorable endorsements at each level of command, approved the soldier's discharge, and settled financial accounts with the soldier.

Under the circumstances of this case, a constructive discharge arose at the time of the soldier's "discharge." The soldier's records should be forwarded to the Army Discharge Review Board for correction to reflect his discharge for the convenience of the government and a recharacterization of his discharge. Captain Bell.

Criminal Law Note

United States v. Lindsey Scott: The Final Act

On October 12, 1983, Marine Corporal Lindsey Scott was tried and convicted by a general court-martial of attempted murder, rape, forcible sodomy, and kidnapping. He was sentenced, *inter alia*, to 30 years' confinement and a dishonorable discharge. This case, however, was far from being over.

In fact, Scott became a cause celebre, reaching national prominence and being the subject of both the national news and 60 Minutes on several occasions. The initial implications were that the military justice system was railroading Corporal Scott and that his prosecution was racially motivated (Scott is black, the victim was white).

In reality, the case turned neither on selective prosecution nor racial bias, but on the effective assistance of counsel.[1] Moreover, the lead defense counsel in the case was not one provided by the Marines, but a civilian counsel that Scott had personally retained.[2]

Scott became aware that he was a suspect in the abduction, sexual assault, and attempted murder of the wife of another Marine on April 21, 1983. On April 22, 1983 he hired a Mr. K., a civilian attorney practicing in Dumfries, Virginia. At their initial meeting Scott told him the facts to establish an alibi defense. Scott told Mr. K. that, on the night of the alleged offense, he was out shopping for his wife's birthday present. Moreover, investigators for the defense later found two people who provided some support to Scott's claims. Mr. K., nevertheless, did not investigate the defense until some five months after his initial consultation with Scott and did not interview the key alibi witness prior to trial, while relying on the alibi as Scott's sole defense. It failed.

On appeal Scott alleged that he was denied the effective assistance of counsel because of his defense counsel's failure to take timely and adequate steps in the preparation of Scott's defense, primarily in regards to the defense counsel's failure to prepare the alibi defense. The United States Court of Military Appeals agreed. In an opinion authored by

[1] Scott's initial appeal went to the Navy-Marine Court of Military Review. That court ordered a *Dubay*-hearing. United States v. Scott, 18 M.J. 629 (N.M.C.M.R. 1984). Upon conclusion of the hearing on March 1, 1985, the record was returned to the court of military review, which affirmed the findings and sentence. 21 M.J. 889 (N.M.C.M.R. 1985). Scott then appealed to the United States Court of Military Appeals, which reversed the lower court's decision on July 6, 1987. 24 M.J. 186 (C.M.A. 1987).

[2] Corporal Scott also had a detailed military counsel, but the civilian counsel was clearly the lead counsel and did not request any assistance. United States v. Scott, 24 M.J. at 191.

Judge Cox, the court held that the civilian counsel's representation was inadequate under the Supreme Court's test in *Strickland v. Washington.*[3] Consequently the case was reversed and remanded to The Judge Advocate General of the Navy with the option of ordering a rehearing. A second trial was ordered.

Scott, armed with three new defense counsel, began his second court-martial on January 25, 1988. Interest in the second trial was again widespread and attracted national media attention. The case was reported almost daily in the Washington Post. Finally, on February 19, 1988, after ten hours and twenty minutes of deliberation, the court-martial panel returned a verdict of not guilty.[4]

Corporal Scott will be restored to his previous grade and is entitled to all rights, privileges, and property that he would have accrued. That includes the payment of $29,000 in back pay and allowances.[5] Since Corporal Scott's enlistment expired on October 1, 1984, his only connection with the Marines has been a legal hold for his court-martial. He was scheduled to be honorably discharged on March 1, 1988.[6] Major Williams.

Neutral Explanations for Peremptory Challenges of Minorities.

The use of peremptory challenges to exclude members of minority groups based solely on their race was prohibited in *Batson v. Kentucky.*[7] In *Batson,* a prosecutor's purposeful discriminatory use of peremptory challenges to remove four black persons from the jury of a black defendant violated the equal protection clause.[8]

How *Batson* applies in the military is unresolved.[9] Until this issue is resolved, the recommended practice is for trial counsel to state a neutral explanation on the record when he or she challenges a minority group court member, so it is clear that the peremptory challenge was not exercised for a discriminatory purpose.[10]

For example, in *United States v. Cox,*[11] the trial counsel challenged the panel's lone black member in the court-martial of a black accused. Defense counsel objected that this was an unconstitutional exercise of trial counsel's peremptory challenge based on *Batson.* Trial counsel explained that he challenged the minority member because the member's "deliberate and hesitant manner of answering the questions posed to him" indicated that the member was "an overly cautious individual who would be hesitant to convict."[12] This neutral explanation satisfied the court that the peremptory challenge was not based on an improper discriminatory purpose.

By stating the neutral purpose for the peremptory challenge on the record, counsel can rebut the inference that the challenge was used to exclude a member of the accused's minority race from the court-martial panel. If the military judge has no grounds to deny the peremptory challenge, the member can be excused from the panel. Then, even if *Batson* is held to directly apply to courts-martial, needless appellate litigation may be precluded.

But it is likely that other issues will remain. State and federal courts are still wrestling with the implementation of *Batson.*[13] As Justice White warned in his concurring opinion, "much litigation will be required to spell out the contours" of the new ruling.[14] Among the issues that the Court of Military Appeals should resolve are, first, does an accused who is not a member of the class being excluded have standing to seek the protection of *Batson?* For example, can an Hispanic accused object to the peremptory challenge of a black court member?[15]

Second, can the exclusion of groups other than racial classes be challenged under *Batson?* For example, can a female accused object to the peremptory challenge of a woman court member? The ready answer is no, because *Batson* was explicitly limited to cases in which the accused shows he is "a member of a cognizable racial group."[16] Nevertheless, in his *Batson* dissent, Chief Justice Burger pointed out that there does not appear to be any reason

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[3] Strickland v. Washington, 466 U.S. 668 (1984).

[4] Sources close to the trial reported that the panel voted 4–3 to convict Scott; a 5–2 vote was necessary to convict. Washington Post, Feb. 21, 1988, at 1, col. 5.

[5] Navy Times, Mar. 7, 1988, at 4, col. 1.

[6] *Id.*

[7] 106 S. Ct. 1712 (1986).

[8] *Id.* at 1718–1722.

[9] *See* United States v. Santiago-Davilla, CM 447830 (A.C.M.R. 6 Aug. 1986) (unpub.), *petition granted,* 24 M.J. 55 (C.M.A. 1987) (*Batson* does not apply; a single peremptory challenge does not permit the government to dramatically change the composition of the court); United States v. Moore, CM 8700123 (A.C.M.R. 17 Dec. 1987) (*Batson* does apply; equal protection prohibits the discriminatory use of even one peremptory challenge; military necessity and the court member selection process do not preclude application), *vacated for hearing en banc* (A.C.M.R. 13 Jan. 1988); United States v. Caver, CM 448132 (A.C.M.R. 20 Feb. 1987) (unpub.) (*Batson* may apply); United States v. Cox, 23 M.J. 808 (N.M.C.M.R. 1986) (assuming *arguendo* that *Batson* applies, no discriminatory purpose in challenging lone black member).

[10] Dep't of the Army Message 121730Z Jan 88, subject: Minority Representation on Court-Martial Panels. *See also* Dep't of the Army Message 211950Z Jan 88, subject: United States v. Moore Vacated.

[11] 23 M.J. 808 (N.M.C.M.R. 1986).

[12] *Cox,* 23 M.J. at 811.

[13] *See generally* Uelman, *Striking Jurors: Batson v. Kentucky,* Criminal Justice, Fall 1987, at 2.

[14] *Batson,* 106 S. Ct. at 1725.

[15] Under the strict equal protection analysis applied in *Batson,* protection is limited to accuseds who are members of the class being excluded. Under a broader Sixth Amendment or due process analysis, protection could be extended to an Hispanic accused objecting to the exclusion of a black court member. *See, e.g.,* Fields v. People, 732 P.2d 1145 (Col. 1987).

[16] *Batson,* 106 S. Ct. at 1723.

why *Batson's* protection should not be extended to other groups.[17]

Third, and most significant, how are trial judges to assess the explanations prosecutors give for their peremptory challenges? As Justice Marshall lamented, "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons."[18] For example, the Alabama Court of Criminal Appeals has upheld a prosecutor's explanations for peremptorily challenging jurors because the juror "appeared to have kind of a dumbfounded or bewildered look," or appeared "unkempt" and "gruff," or was "frowning" and seemed "in a bad mood."[19] The same court upheld explanations that a juror would not know "what life is like out on the streets," or was a "grandmotherly type" who would be "too sympathetic."[20]

California courts, on the other hand, have rejected such explanations, because they do not relate to "specific bias."[21] They rely on the majority opinion in *Batson*, which declares that general assertions are not enough, and that the prosecutor must articulate an explanation "related to the particular case to be tried."[22] California courts have imposed a duty upon trial judges to conduct a probing inquiry, rather than simply accept prosecutorial explanations at face value.[23]

The Georgia Supreme Court recently reversed a black defendant's capital murder conviction because the trial judge did not conduct a more searching inquiry into the prosecutor's purported explanation for peremptorily challenging all of the black jurors.[24] The court regarded several of the prosecutor's explanations as suspect. Juror Mason was challenged because he was "uncooperative" and because he had spent six years in the Army. The prosecutor said that given the usual lengths of time spent in the service, six years indicated a "sinister" reason for being put out of the Army. The prosecutor, however, asked Mason no questions about his military service.[25] Juror Mosely was struck for his low intelligence, being a brick mason, and membership in a church located near the defendant's home. Nothing during voir dire showed low intelligence and two whites on the jury admitted they were "a little slow"[26] or illiterate. It was not clear how these other reasons related to the case. Another juror, McGruder, was struck because he answered that a close friend had an alcohol or drug abuse problem, yet several white jurors also gave the same answer and were not struck.

The court cited three reasons for finding that the prosecutor had not given neutral explanations to rebut the *prima facie* case of a discriminatory use of peremptory challenges. First, his voir dire of many of the black jurors was minimal. Second, some of his reasons or explanations were based on questionable premises not related to the case at trial. And third, in some instances, similarly situated white jurors were not challenged.[27]

Generally, the trial court's actions construing whether the prosecutor has offered racially neutral reasons for his challenges will be affirmed unless clearly erroneous. " '[R]ubber stamp' approval of all nonracial explanations, no matter how whimsical or fanciful, would cripple Batson,"[28] however. The prosecutor's explanations need not rise to the level of cause, but must be "related to the case to be tried" and be "clear and reasonably specific."[29]

The Court of Military Appeals' task of deciding how *Batson* applies to the military is an arduous one. The *Batson* opinion left many issues undecided, issues that the state and federal courts are still grappling with. In the meantime, military counsel should strive to comply with the *Batson* decision. Trial counsel, in particular, should give clear and reasonably specific explanations, related to the case to be tried, whenever he or she peremptorily challenges a minority court member who is from the same racial group as the accused. Defense counsel should be ready to raise the *Batson* issue when this is not done. Captain Lisowski.

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[17] *Id.* at 1737.

[18] *Id.* at 1728.

[19] Branch v. State, 40 Cr. L. Rptr. 2215 (Ala. Crim. App. 1986).

[20] Wallace v. State, 41 Cr. L. Rptr. 2019 (Ala. Crim. App. 1987).

[21] People v. Trevino, 704 P.2d 719 (Cal. 1985) (a "specific reason" is not equivalent to "specific bias").

[22] *Batson*, 106 S. Ct. at 1723.

[23] People v. Hall, 672 P.2d 854 (Cal. 1983). This duty is based on the right, under the California state constitution, to a jury panel drawn from a representative cross-section of the population. *See Uelman, supra* note 7, at 3.

[24] Gamble v. State, 41 Cr. L. Rptr. 2344 (Ga. Sup. Ct. 1987).

[25] *Id.* at 2345.

[26] *Id.*

[27] *Id.*

[28] State v. Butler, 41 Cr. L. Rptr. 2081 (Mo. Ct. App. 1987).

[29] *Batson*, 106 S. Ct. at 1723. Under the analysis applied in the California and Georgia cases discussed above, the trial counsel's explanations in *Cox* could arguably be attacked for being unrelated to the case being tried or for being unclear and nonspecific.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer.*

Consumer Law Notes

Faulty Home Appraisals Lead to Congressional Inquiry

The March 1988 edition of *The Army Lawyer* included a legal assistance note by Captain Magid, a Fort Gordon legal assistance attorney, describing fraudulent home sales in San Antonio, Texas. After submitting that note, Captain Magid presented testimony to the House Subcommittee on Commerce, Consumer, and Monetary Affairs. His testimony included evidence of home sales by Ray Ellison Homes, Inc., that were financed by Veterans Administration (VA) guaranteed loans supported by faulty and/or fraudulent appraisals.

The VA has postponed foreclosure of one home to allow the homeowner adequate time to consider which of three alternative VA settlement offers would be most beneficial. One option would allow the homeowner to sell the home for current market value and pay the VA the difference between the sale price and the amount due to the note holder. The second alternative would allow the homeowner to convey a deed in lieu of foreclosure to the VA subject to the homeowner conveying a promissory note for a presently undetermined sum. The last option contemplates foreclosure on the home but allows the homeowner to request a waiver or compromise of the deficiency balance from the VA Committee on Waivers and Compromise.

These settlement options have currently been presented to only one of Captain Magid's clients. On March 4, 1988, Captain Magid presented testimony regarding the apparent home sales and appraisal fraud to the Senate Veterans Affairs Committee. Captain Magid anticipates additional meetings with congressional representatives, which may result in the extension of more favorable settlement offers to all similarly situated victims of the fraud currently under investigation.

Legal assistance attorneys representing clients who have encountered similar situations are encouraged to contact Captain Magid and to follow *The Army Lawyer* for additional information. Captain Magid can be reached at (404) 791–7812/13/83 (commercial), 780–7812/13/83 (autovon), or 240–7883/6673 (FTS). Captain Daryl Magid, Legal Assistance Attorney, Fort Gordon, Georgia.

Discounts on Early Rental Payments May be Disguised Late Fees

In *Shellhorn Management v. Jackson,* No. 86-06376–LT–F (Mich. Dist. Ct., May 4, 1987), the Michigan state district court has found that a clause in the defendant tenant's lease providing for a "discount" if the rent is received on or before the rental due date may constitute a hidden late fee clause. In *Jackson,* the plaintiff landlord filed suit seeking to recover past-due rent from the defendant tenant pursuant to such a lease clause. The court found that the tenant was liable to pay the rent due under the lease but that the discount payment lease clause constituted a hidden late fee clause. The court consequently held that the "discount" was subject to the usual late fee attacks under state usury laws. While the court found that this particular late charge of $25 was usurious, it did allow a late fee of $15. Major Hayn.

Penalties for Credit Card Offenses May Be Escalating

A law recently enacted in Michigan (Mich. Comp. Laws §§ 750.157, 750.248a, and 756.249a) may reveal a trend favoring increased punishment for fraudulent use or possession of what the law calls "financial transaction devices." Effective March 29, 1988, the Michigan Penal Code provisions regarding credit card offenses have been expanded to include all "financial transaction devices." Such devices are defined as electronic fund transfer cards, credit cards, debit cards, point-of-sale cards, or other instruments, devices, cards, plates, codes, account numbers, personal identification numbers, or other means of access to credit accounts that can be used alone or with other access devices to obtain money, cash refunds, credit account credit, goods, services, any other thing of value, to certify the availability of funds, or to provide access to deposit accounts. The new Michigan law makes knowing possession of a fraudulent or altered financial transaction device a felony. Major Hayn.

Tax Notes

More Developments on the Taxability of Military Retired Pay Received By Former Spouses

Several months ago in this column, we reported that the Internal Revenue Service (IRS) had issued a Private Letter Ruling concluding that amounts paid from a military pension to a former spouse as a result of a property division in a community property state were includible in the gross income of the recipient. (Note, *IRS Rules Payments From Military Retired Pay Not Includible in Gross Income of Payor,* The Army Lawyer, Dec. 1987, at 43). The Treasury Department has recently addressed this issue further in another Private Letter Ruling and in a letter to Congress.

In the Private Letter Ruling, the IRS was asked whether a former spouse was entitled to a credit for a proportionate share of the federal tax withheld from her ex-husband's military retirement pay (Priv. Ltr. Rul. 8805020 (Nov. 5, 1987). A property settlement agreement accompanying the parties' divorce decree provided that the husband pay the wife $1,100 per month as spousal support. The agreement further specified that the military pay center pay $750 of the monthly support directly from the husband's retirement pay.

The IRS noted that, although the laws of the state where the parties resided considered pensions earned during marriage to be marital property, the terms of the divorce decree and settlement agreement control how the payments should be characterized for tax purposes. The IRS concluded that, based on the settlement agreement, the amounts received by the ex-wife were intended as alimony rather than as a portion of her former husband's wages. Thus, for tax purposes, the husband is treated as having received the entire amount

of his retirement pay, is taxed on it as wages, and then pays a portion to his ex-wife as alimony.

Because the amount received by the former spouse is not characterized as wages, it is not subject to withholding tax under the Internal Revenue Code (I.R.C. § 3402 (West Supp. 1987)). Accordingly, the IRS ruled that the former wife was not entitled to a credit for the portion of the tax withheld by the military pay center from her ex-husband's military retirement pay.

In a letter sent to Congress, the Treasury Department clarified some of its earlier rulings on the taxability of military retirement pay received by former spouses. (Letter from Department of the Treasury Office of General Counsel to Chairman, Subcommittee on Oversight, Committee on Ways and Means, dated January 27, 1988). According to the letter, the tax consequences of payments of military retired pay depend on whether the payments are characterized as alimony or a division of property. If the payments are characterized as alimony, the full amount of the retirement payment is allowed as a deduction for the payor (I.R.C. § 215 (West Supp. 1987)), and must be included in gross income of the payee (I.R.C. § 71(a) (West Supp. 1987)). This conclusion is consistent with the Private Letter Ruling discussed above.

The letter further explains the Treasury Department's view that military pay that is included in the retiree's gross income but paid directly to a former spouse under the Uniformed Services Former Spouses' Protection Act (USFSPA) should be deemed paid directly by the retiree for purposes of satisfying alimony requirements. Since the USFSPA requires that direct payments terminate upon the death of the payee, these payments also satisfy the code requirement that there be no liability to make alimony payments upon the death of the payee spouse (I.R.C. § 71 (West Supp. 1987)).

Although the tax consequences of direct payments of retired pay qualifying as alimony are clear, the Treasury Department is unable to provide any generally applicable guidance on the tax treatment of retirement payments made to a former spouse as a property division. The IRS is studying the issue in light of a number of legislative changes to the tax code and should publish a position soon.

In light of these recent opinions, counsel representing retirees should attempt to characterize payments made directly from retirement pay as alimony. Although the finance center may continue to withhold tax on the entire amount of retirement pay, the retiree will be able to deduct all amounts paid to the former spouse under this approach. To make the proposal attractive to the payee spouse, the retiree may agree to provide a higher amount of monthly support or to extend support beyond the date of the payee spouse's remarriage.

Parties who desire to treat payments from retirement pay as a division of marital property could try to deal with the uncertainty in this area by including a provision in their agreements calling for modification of payment amounts if the tax consequences are not as anticipated. Parties who have already executed property settlement agreements may be able to determine the tax consequences of the payments involved by requesting a private letter ruling (Revenue Procedure 87–1, 1987–1 I.R.B. 7). Before making the request, however, these parties should note that a recent legislative change requires the IRS to charge a service fee for issuing letter rulings (I.R.C. § 6416(b), as amended by 1987 Revenue Act, Pub. L. No. 100–203, __ Stat.__ (1987)). Major Ingold.

IRS Rules Couple May Defer Gain When Separate Homes Are Sold

The Internal Revenue Service has issued a ruling addressing the applicability of section 1034 when a husband and wife sell their separately owned homes and jointly purchase a replacement residence. (Priv. Ltr. Rul. 8803055, Oct 26, 1987). A couple, referred to here as Alice and Bob, each owned homes prior to their marriage. Alice sold her home six months after her marriage to Bob but did not pay tax on the gain. Alice and Bob continued to reside in a home Bob had purchased prior to the marriage. The couple asked the IRS to address whether section 1034 tax treatment would be available if they sold Bob's home and jointly purchased a more expensive replacement home.

Generally, section 1034 of the Code requires taxpayers who sell their primary residence to defer gain realized on the sale of the home if a more expensive replacement home is purchased within a statutory replacement period (I.R.C. § 1034 (West Supp. 1987)). For most taxpayers, the replacement period is four years consisting of the two years before and the two years after the first home is sold. The replacement period is suspended for up to four years after the sale of the home for taxpayers serving on active duty with the Armed Forces. (I.R.C. § 1034(h) West Supp. 1987)). The replacement period is further suspended for up to four additional years for members serving overseas.

The IRS, relying on a 1975 Revenue Ruling, ruled that Section 1034 was available to both Bob and Alice (Rev. Rul. 75–238, 1975–1 C.B. 257). According to the IRS, section 1034 will be applied to the sale of Alice's separate residence as if she had acquired the new marital property for the portion of the purchase price represented by her ownership interest. Similarly, section 1034 will be applied to the sale of Bob's separate residence based on his ownership interest in the new home.

Although a private letter ruling does not constitute precedent, couples planning to buy and sell homes upon marriage should consider the effect of section 1034 on the transaction in light of the position taken by the IRS in the ruling. For example, if gain on the sale of separately owned homes is greatly disparate, a couple should consider giving the party with the higher gain a greater interest in the marital home. If only one of the parties to a marriage had a separate residence prior to the marriage, the parties may be able to defer more tax on the gain if that party owns a greater interest in a newly purchased marital home.

Taxpayers anticipating transactions involving their homes will generally not be able to rely on the IRS to address the probable affect of section 1034 before the fact. The IRS declines to issue preliminary rulings on the amount of gain that must be recognized if a home is sold and another one is purchased because the prices of the homes involved and the period between purchase and sale could affect the result. (Rev. Proc. 87–1, 1987–1 I.R.B. 7.11). The IRS also refuses to issue private letter rulings on whether a particular home qualifies as a principal residence within the meaning of section 1034. (Rev. Proc. 87–3, 1987–1 I.R.B. 27). Major Ingold.

Divorce Revokes Will Provisions in Favor of Spouse

Unlike the law relating to insurance contracts, probate law in many states implies revocation of will provisions adopted in favor of a former spouse. A recent case holds that this doctrine may apply even though the will was executed before the parties married.

In *Davis v. Aringe*, 731 S.W.2d 210 (Ark. 1987), the testator, Taylor, executed a will naming his girlfriend, Irma, as the primary beneficiary and executrix. About one year later, Taylor married Irma. The marriage was short-lived, however, and they obtained a divorce after two years.

Taylor died a short while later and Irma asked the court to probate his will. Taylor's sole heir contested the will, claiming it had been revoked under an Arkansas statute providing that, if the testator were divorced after making a will, all provisions in favor of the testator's ex-spouse were revoked.

The trial court ruled that the Arkansas statute applies only when the testator executes the will during marriage, but not before. The Supreme Court of Arkansas reversed this decision, pointing out that the statute did not distinguish between wills predating marriage and those that were executed following marriage.

Although many states have statutes similar to Arkansas (79 Am. Jur. 2d, Wills § 685), it would be inadvisable for divorcing spouses to rely on such laws to revoke their wills. The laws in some states may, for example, not allow for implied revocation if the will was executed prior to the marriage. Some state statutes that prescribe the acts necessary to revoke a will contain an exception permitting revocation by implication if there are any changes in the testator's circumstances. (79 Am. Jur. 2d, Wills § 587). Under such statutes, a divorce would not cause revocation of a will benefitting the former spouse if the will had been executed before the parties married. Major Ingold.

Divorce May Not Invalidate Life Insurance Designation

A Louisiana state court decision illustrates the importance of making sure that insurance policies are reviewed carefully by legal assistance attorneys when advising clients going through divorce proceedings. In *American Health and Life Insurance v. Binford*, 511 So. 2d 1250 (La. Ct. App. 1987), the court held that termination of a marriage has no effect on the provisions of a life insurance policy naming the former spouse as beneficiary.

The plaintiff insurance company in the case issued a $20,000 insurance policy to the husband, Jerry. The policy was issued contemporaneously with a mortgage on the family home and the premiums were included in the monthly mortgage payments. When the policy was issued the husband named his wife as beneficiary, inserting her name, Monica, in the space for beneficiary and adding the word "wife" in the space provided for listing the relationship.

The parties divorced and Monica remarried. Jerry purchased his ex-wife's interest in the marital home, but did not change the designation naming her as the beneficiary of the policy.

When Jerry died, Monica claimed the proceeds of the policy. A guardian of Jerry's daughter by an earlier marriage claimed, however, that the proceeds should be added to Jerry's estate. The guardian argued that Monica's status as "wife" terminated upon divorce and there was no wife who could claim as the named beneficiary. The trial court agreed and concluded that Jerry's heirs should receive the proceeds of the policy.

The appellate court disagreed with the trial court and ruled that Monica was the proper beneficiary. There was no evidence that Jerry attempted to change the beneficiary and there was nothing on the face of the contract itself that suggested that he intended to name another beneficiary. According to the court, the divorce had no automatic effect on the provisions of the policy.

This case points out the need to re-evaluate the designation of insurance policy beneficiaries whenever clients are involved in a change of circumstances. Legal assistance attorneys should advise clients undergoing divorce or separation that in addition to reviewing all insurance policies, they should also re-evaluate their Last Will and Testament and other documents naming beneficiaries, such as DD Form 93, which lists the beneficiary of military entitlements. Major Ingold.

Former Spouses' Protection Act Benefits

Ever since enactment of the Uniformed Services Former Spouses' Protection Act there has been confusion regarding what spouses are entitled to what benefits. The problem has been compounded by Congress' repeated amendments to the Act.

The most confusing aspect of former spouses' entitlements has been the length of time the parties must have been married to qualify the spouse for a given benefit. The following chart summarizes the coverture aspect of former spouses' entitlements.

For some benefits, additional requirements must be met (for example, a former spouse must remain unmarried to continue using the post exchange and commissary; the same limitation applies to health care). The chart notes these additional requirements in the footnotes.

Further information on former spouses' benefits can be obtained from AR 640–3 and the nearest military personnel office. Additional information regarding direct payment of retired pay can be obtained from the Army Finance and Accounting Center, phone (commercial) (317) 542–2151/2155, (autovon) 699–2151/2155. Major Guilford.

FORMER SPOUSE ELIGIBILITY FOR BENEFITS UNDER THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT[1]

LENGTH OF TIME THAT MARRIAGE OVERLAPS WITH SERVICE CREDITABLE FOR RETIREMENT PURPOSES[3]	BENEFITS FOR FORMER SPOUSES[2]								
			Direct Payment[6]			Health Care[7]			
	Division of Retired Pay[4]	Designation as an SBP beneficiary[5]	Child Support	Alimony	Property division	Transitional[8]	Full	Commissary[9]	PX[9]
0 years to less than 10	X	X	X	X					
10 years but less than 15	X	X	X	X	X				
15 years but less than 20	X	X	X	X	X	X			
20 or more years	X	X	X	X	X		X	X	X

NOTES:

1. Pub. L. 97–252, Title X, 96 Stat. 730 (1982), as amended. This chart reflects all changes to the Act through the amendments in the National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99–661 (1986).

2. For guidance on obtaining a military identification card to establish entitlement to some of these benefits, see Army Regulation 640–3. Former spouses of reserve component soldiers are generally entitled to these benefits, but health care and commissary and PX privileges will be available only if the soldier elected to participate in the SBP program at the 20-year mark.

3. "Creditable service" does not include the sponsor's time on a Disability Retired List or a Temporary Disability Retired List. The requisite overlap can derive from more than one marriage to the same soldier, but marriages to two or more soldiers cannot be combined to qualify for any benefit.

4. At least one court has awarded a portion of military retired pay to a spouse whom the retiree married after he retired.

5. Federal law does not create any minimum length of overlap for this benefit; the parties' agreement or state law will control a former spouse's entitlement to designation as an SBP beneficiary.

6. See 10 U.S.C. §§ 1408(d) & 1408(e) and 32 C.F.R. Part 63 for further guidance on mandatory language in the divorce decree or court-ratified separation agreement.

7. To qualify for any health care provided or paid for by the military, the former spouse must be unremarried and not covered by any employer-sponsored health care plan. See 10 U.S.C. §§ 1072(F) & 1072(G). DA interpretation of this provision holds that termination or annulment of a subsequent marriage does not revive this benefit. "Full health care" includes treatment in military facilities and through CHAMPUS. "Transitional health care" includes full health care for 2 years after the date of the divorce or until 1 April 1988, whichever is later. At the end of this period, Congress envisions the former spouse being eligible to enroll in a civilian group health care plan to be negotiated by DOD (enrollment is to be at no cost the government). No such plan exists as of 1 February 1988.

8. If the divorce decree is dated prior to April 1, 1985, the former is spouse entitled to full health care. See 10 U.S.C. § 1072(G).

9. Pursuant to service regulations, commissary and PX benefits are to be available "to the same extent and on the same basis as the surviving spouse of a retired member. . . ." Pub. L. 97–252, Title X, § 1005, 96 Stat. 737 (1982); see Army Regulation 640–3. The date of the divorce is no longer relevant for commissary and PX purposes. See Pub. L. 98–525, Title IV, § 645, 98 Stat. 2549 (1984) (amending Uniformed Services Former Spouses' Protection Act § 1006(d)). The former spouse must be "unremarried," and termination or annulment of a subsequent marriage does not revive these benefits. Notwithstanding the provisions of the Act, however, the extent of commissary and exchange privileges in overseas locations may be restricted by host-nation customs law.

Contract Law Note

Distribution of Budget Authority From Congress: The Army Model

Introduction

This note will address the flow of funds from the Congress to the Army installation in three parts: the flow of funds from the Congress to Department of Army (DA); the management and control of funds at DA; and the flow of funds from DA to the installation level. The discussion will focus on the distribution of budget authority from the Operations and Maintenance, Army (OMA) appropriation.

The Flow of Funds From Congress to DA.

Congress enacts legislation that authorizes federal agencies to carry out particular programs. These laws, called *Authorization Acts*, provide guidance on the amount that should be appropriated for each program. The Authorization Acts do not, however, provide authority to obligate and expend public funds (budget authority). Instead, budget authority is found in an *Appropriations Act*, which normally follows the Authorization Act.

The Army funding process begins when Congress passes the annual Department of Defense (DOD) Appropriations Act and the President signs the bill into law. Copies of the act are then sent simultaneously to the Treasury Department for preparation of appropriation warrants, and to the Office of Management and Budget (OMB) for apportionment. 31 U.S.C. § 1512 (1982).

Based upon the DOD Appropriations Act, the Treasury Department prepares the *appropriation warrant*. The warrant, in effect, establishes checking accounts at the Treasury for each appropriation in the act. In our case, a Treasury checking account is established for the OMA appropriation, as well as the other Army appropriations. The Treasury warrant gives the Army authority to disburse public funds against those accounts, but not the authority to obligate those funds.

Authority to obligate funds is obtained only after the budget authority is *apportioned* by OMB. As soon as the DOD Appropriation Act becomes law, the Director of Army Budget prepares a request for apportionment. Apportionment is the distribution to a federal agency of the authority to obligate funds approved in Appropriations Acts. According to 31 U.S.C. § 1512, appropriations must be apportioned in a manner that will prevent obligation or expenditure at a rate that would necessitate a supplemental appropriation (The OMA appropriation is apportioned on a quarterly basis to DA.). The apportionment requests are approved by the Assistant Secretary of the Army (Financial Management) and are forwarded to the Office of the Secretary of Defense (OSD), Comptroller. OSD then forwards the request to OMB.

After OMB approves the apportionment, it is returned to OSD. OSD, in turn, provides a copy of the OMB apportionment to the Army. It also provides the Army with a second document containing OSD limitations on obligational authority. OSD may provide the Army with the same, or less, obligational authority than that approved by OMB in the apportionment.

DA Management and Control of Budget Authority.

The management of budget authority is the responsibility of the Director, Army Budget Office, Office of the Secretary of the Army (currently Major General McCall). The Army Budget Office is responsible for the Army application of the DOD Planning, Programming, Budgeting, and Execution System (PPBES). Within the Army Budget Office, each appropriation is managed by a general officer or equivalent, called an *appropriation director*. The current Director of the OMA appropriation is Brigadier General Mallion, Chief, Operations Division, Army Budget Office.

The primary tool for management of budget authority is the Army's Program Budget Accounting System (PBAS). PBAS is a real time on-line automated fund control and distribution network established by the U.S. Army Finance and Accounting Center (USAFAC). It distributes budget authority instantly to the major commands (MACOMs) and Special Operating Agencies.

Soon after the President signs the Authorization Act, the Director of the OMA account loads the OMA annual funding program into PBAS. This program is modified (reconciled) when the OMB apportionment, the Treasury warrant, and the OSD obligational authority document are received at USAFAC. This reconciliation establishes funding controls for the Army appropriations.

The control of Army budget authority is the responsibility of the Army's Fund Control Officer (FCO), Finance & Accounting Division, USAFAC (currently Mr. Greg Bitz). The FCO approves the distribution of budget authority and acts as the Army's bookkeeper, exercising control using PBAS.

The Flow of Funds From DA to The Installation.

After all obligation and disbursement authorities are loaded into PBAS and are reconciled, the Director of the OMA appropriation initiates fund authorization documents (FADs) to "allocate" (distribute) budget authority to special or general operating agencies (The term "general operating agency" refers to the Army's MACOMs, while the term "special operating agency" refers solely to the Army Materiel Command and the U.S. Army Information Systems Command, Fort Huachuca). The FADs initiated by the appropriation directors are reviewed and approved by the FCO, and then are transmitted electronically to the operating agencies using PBAS.

Using PBAS, general operating agencies may use a FAD to "allot" (distribute) budget authority to their subordinate installations. The distribution of budget authority to the installation on a FAD imposes absolute limitations and antideficiency restrictions on the receiving command. In the alternative, general operating agencies may transmit budget authority on a fund *allowance* document rather than a fund *authorization* document. This results in antideficiency restrictions being retained at the general operating agency.

As an example of this fiscal principle, TRADOC, a general operating agency, distributes budget authority on a fund allowance document to its subordinate installations. This results in antideficiency restrictions being retained at TRADOC. If TRADOC suffers an antideficiency violation in its OMA appropriation allotment, however, the installation that exceeded its allowance and caused the violation may be cited as the responsible party. Major Munns.

Claims Report

United States Army Claims Service

Personnel Claims Note

Lost or Damaged Personal Property

This note is designed to be published in local command information publications as part of a command preventive law program. This note should be adapted to include local policies.

Soldier, has your personal property ever been lost or damaged because of your service in the Army? If so, you may have a right to file a claim for this loss under Title 31, United States Code, Section 3721 (The Personnel Claims Act). This right is one additional benefit for military service provided for you by the United States Army. Service-connected losses include losses in assigned quarters or losses to household goods while being transported on PCS orders. These are the major areas of coverage under the Personnel Claims Act, but there are many more. To recover under the Act, however, you have certain responsibilities to help prevent loss of or damage to your personal property. Watch this column for more information concerning the extent of your benefits under this statute and what actions are expected of you to safeguard your property. If you have any questions, contact your claims office. The claims office number is xxx–xxxx.

Tort Claims Note

Recent FTCA Actions

Failed Diagnosis. A claim for injuries incurred due to a failure to timely diagnose systemic lupus erythematosis (SLE) was denied. The claimant was initially and successfully treated for infective endocarditis (which in fact she had). Even if the SLE diagnosis was delayed (it was diagnosed within 60 days of initial presentment), the delay had no effect on the outcome as SLE is not treatable, except for palliative measures, and is considered a terminal condition.

Unexplained Infant Death. A claim for the death of a two-month-old baby was denied. The cause of death was a matter of considerable dispute among various experts. The autopsy, conducted two days after death, stated it was caused by viral pneumonia even though a virus could not be cultured. The opinion of several pathologists was sudden infant death syndrome (SIDS) but another pathologist disagreed, as he considered SIDS a diagnosis of elimination. The medical records from two visits on successive days just prior to the death indicated no lung congestion despite careful examination by fully competent personnel. A failure to explain the death is not cause for payment.

Unsafe Leased Property. A claim for real property damage due to a fire caused by sparks emanating from a leased locomotive operated by an Army employee was denied by the government and was forwarded for settlement to the lessor who owned the locomotive even though the lease contained an indemnity clause. The owner knowingly leased a switch engine with no spark arrester for use outside the railroad yards in open country and provided the United States no opportunity to inspect as the rental occurred late at night for immediate use. The indemnity clause is a violation of the anti-Deficiency Act, 31 U.S.C. § 1341 (1982).

Delayed Diagnosis. The U.S. Army Claims Service made a final offer in the amount of $10,000 for injuries to an adolescent female allegedly due to failure to diagnose a tubo-ovarian abscess. The abscess was discovered five weeks after her initial visit for upper abdominal pain, a condition for which she had been treated two years previously. She had no signs or symptoms of a tubo-ovarian abscess. On her third visit to another medical treatment facility, diagnosis was made and surgery resulted in the removal of one fallopian tube and ovary. Earlier diagnosis and treatment probably would not have avoided significant damage to her tube and ovary. It was our position that the damage alleged required an expert opinion, which was not presented despite our request.

Management Note

Certificates of Achievement

This is a reminder to all staff judge advocates that U.S. Army Claims Service (USARCS) Certificates of Achievement may be requested for presentation to selected personnel serving in judge advocate claims offices worldwide. The certificate provides special recognition to civilian and enlisted claims personnel who have made significant contributions to the success of the Army Claims Program within their assigned commands.

The criteria for the issuance of a certificate are:

a. the recipient must be a civilian employee or enlisted soldier currently serving in a judge advocate claims office;

b. the recipient must have worked in claims for a minimum of five years (this time may be figured on a cumulative basis and relate to different assignments or claims positions);

c. the recipient must be nominated by the staff or command judge advocate, detailing the contributions of the individual that makes him or her worthy of this recognition; and

d. only one person in an office may be nominated for a certificate in any one calendar year (waivable in exceptional cases at the request of the nominating official to allow two individuals in a single office to receive the certificate in one calendar year).

Nominations should be addressed to the Commander, USARCS, who is the approving official for the award of the certificate. Upon approval, the certificate, signed by the Commander, USARCS, will be forwarded to the nominating official for presentation at an appropriate ceremony.

Automation Notes

Information Management Office, OTJAG

Energize Me!

Your Z-248 doesn't run on batteries, but it does have a little lithium battery inside to keep its clock ticking while the main power is off. This battery has an expected life of about two years, but, as you might expect, some don't last that long (at least in OTJAG). When the battery wears out, the hapless user (that's you) must manually configure the system (see your Users' Guide) to get it going. To avoid needless hardship, anxiety, and etcetera, it's a good idea to lay in a stock of these beauts. Two sources are:

Engineered Assemblies Comm'l (201)340-0600
Electrochem Part #3B940-TC
and
Perrot Engineering Comm'l (703)532-0700
Salt America Part #500200

Replacing the battery requires opening the system unit, so be sure to follow the Users' Guide. Captain David L. Carrier.

Tape Backup Blues

In response to popular demand, the Interdyne 40 Megabyte Tape Backup System was added to the Zenith Microcomputer Contract (CLIN 0016AA) last year. At the time it seemed like a dandy idea and was touted in this column last August. Unfortunately, it has since failed testing here in OTJAG and throughout the military. Zenith has been asked to propose a substitute system and replace all units currently in the field with the new system. Watch this space for further developments. Captain David L. Carrier.

Observe Copyrights

Users of software products are responsible for observing all copyright and license agreements related to those products. Persons who are unsure about copyrights on specific products should ask their local information manager. Unauthorized reproduction of copyrighted software is a violation of the Copyright Act of 1976. Don't risk career embarrassment by making, distributing, or using illegal copies of copyrighted software.

Automation SOP

As JAG offices become more automated, the need to define automation responsibilities, policies and procedures increases. To satisfy this need, each office should develop an automation/information management standard operating procedure (SOP) addressing such issues as installation, maintenance, security and training. The following reprint of JAG Reg 18-1 is offered as a model for developing your own office SOP:

Army Automation

Automation Responsibilities, Policies, and Procedures

1. PURPOSE. This regulation describes the policies and procedures used by the Office of The Judge Advocate General (OTJAG) to manage automated data processing equipment (ADPE). These policies seek to—

a. Maintain a balance between autonomy of user divisions and central management of automation.

b. Achieve productivity benefits of personal computers without threatening integrity of data bases or creating duplication.

c. Encourage use of the personal computer as a tool to assist in accomplishing tasks.

d. Give users the opportunity to independently develop applications.

2. APPLICABILITY. This regulation applies only to OTJAG elements and personnel located in the Pentagon.

3. GENERAL RESPONSIBILITIES.

a. The Information Management Officer (IMO) is responsible for administration of this policy.

b. The IMO will establish an Information Center to answer questions for users, coordinate hardware and software maintenance, and help users develop ADPE applications. The Information Center will maintain a list of standard hardware and software product configurations and provide technical advice, assistance, and training for standard hardware and software products.

c. The General Services Branch, Administrative Office, will manage maintenance and warranty service for all products and act as liaison between users and maintenance contractors. The General Services Branch will also requisition all ADPE and supply-support items requested by users and approved by the IMO.

d. User division/office chiefs are responsible for development of personal computer applications. Users design, implement, and operate function-specific applications and are responsible for accuracy, quality, and security of applications.

e. Division/Office Chiefs will designate an "automation coordinator." See paragraph 5 below for a description of this person's responsibilities.

f. The Information Management Office will work with division/office automation coordinators to define, technically evaluate, and design solutions to division/office automation requirements.

4. INFORMATION CENTER RESPONSIBILITIES. The information Center is a technical support function of the Information Management Office. It is responsible for assisting users of personal computers in all technical matters. The Information Center has primary responsibility for software and hardware installation, registration, user-level maintenance, and development of OTJAG automation standards.

a. User Assistance Services. The following user assistance services are available from the Information Center:

(1) Consultation on system application, design, and implementation.

(2) Advice on hardware and software operation.

(3) Assistance with office automation configurations.

(4) Assistance in selecting hardware or software products.

(5) Development of automation policies, procedures, and standards.

(6) Assistance in developing new software applications.

b. Resolving Hardware and Software Problems.

(1) The Information Center will assist in resolving hardware and software problems. When a supported hardware or software component fails to perform correctly, users should call the Information Center. If unable to correct the problem, the Information Center will request vendor service through the General Services Branch unless the faulty equipment is covered under the original manufacturer's warranty. If the warranty is still in effect, the Information Center will submit the unit to the manufacturer for repair.

(2) If the Information Center refers a problem to a vendor for solution, the Information Center will track the vendor's actions

and keep the user informed of steps taken to solve the problem. If the Information Center concludes that the problem is the result of user error, the Information Center will so notify the user and provide instructions on how to avoid reoccurrence of the problem.

c. Hardware Installation, Repair, and Maintenance.

(1) The Information Center will receive, assemble, checkout, and install all new ADPE in the location selected by the user. Users requesting ADPE should discuss and develop delivery and installation schedules with the Information Center as soon as the requisition is submitted.

(2) The Information Center will coordinate with users to schedule routine preventive maintenance as appropriate.

d. Software Distribution and Maintenance.

(1) All computer software will be approved for order by the Information Center. The Information Center will take delivery of each package and ensure it is the current version. If accepted, the Information Center will return all warranty registration cards or license agreements to the vendor. All software will be registered in the name of the Information Center.

(2) New versions, enhancements, or maintenance releases that are shipped to the Information Center will be forwarded to users. If there is an extra charge for a new version of a software product, the user division will be consulted before a decision is made to acquire the new version.

(3) If the Information Center becomes aware of a software problem, it will notify users and recommend methods of avoiding or solving the problem.

e. Registration of Hardware and Software.

(1) The Information Center will maintain a current and complete inventory of all computer hardware and software located within OTJAG. The inventory will contain a complete description of each piece of hardware including the name of the user and its location.

(2) The inventory will be used by the Information Center for repair, maintenance, and user assistance purposes. Annually, the Information Center will request that users verify the list of computer products registered to them.

f. Standard Products. The Information Center will maintain a list of standard vendor products approved for use in OTJAG. JAG Circular 18–1 lists standard OTJAG hardware and software products.

g. Newsletters and Library. The Information Center will publish quarterly, or more frequently if necessary, a newsletter containing general information of interest to all OTJAG personal computer users. The Information Center will maintain a library of personal computer reference manuals and magazines.

5. USER RESPONSIBILITIES. Responsibility for the development of ADPE applications is vested in user divisions. Consulting services are available from the Information Center, but users control hardware and software applications.

a. Machine Usage.

(1) The policy for use of personal computers is similar to the policy for other office machines such as typewriters. The user division is fully responsible for managing and controlling the use of its ADPE.

(2) Computers may be used for training purposes, but such training must be directly related to the employee's job and must directly support OTJAG 21 missions.

(3) Physical access to office computers should be limited to those persons who are authorized by division/office management.

(4) No personal computer, peripheral device (e.g. modem, printer, plotter), or part thereof will be removed from OTJAG without written permission from the Information Management Officer. Similarly, no software diskette or instruction booklet may be removed from an OTJAG Division/Office without permission of the Division/Office Automation Coordinator.

(5) Portable personal computers and associated software may be checked out for temporary use at home or on TDY. Property passes will be obtained from the General Services Branch.

b. Hardware and Software Product Selection.

(1) Users are responsible for requesting hardware and software products for their office automation and ADP applications. Users must ensure that the products are suitable for the intended use and that they fit properly into the work environment. Environmental engineering, i.e., furniture, lighting, temperature, and electric power consumption, should be considered in the planning process.

(2) Division/offices must request procurement of personal computer products through the IMO. The Information Center will assist users in selecting software for their applications and designing their computer configurations. In addition, the Information Center will review all proposed new product acquisitions for technical adequacy prior to submission to the General Services Branch for procurement.

(3) Products should be ordered from the list of standard products (JAG Cir 18–1) whenever possible. If there is nothing on the list that performs the required functions, other products may be selected. When justifying product selection, users should explain the reasons for selecting unlisted products.

c. Complying with Standards. Users are responsible for understanding and complying with JAGC automation standards. The Information Center will distribute new standard products to users as they are developed.

d. Security.

(1) Users are responsible for security of computer equipment and information stored on it. The ADPE must be protected from theft, damage, destruction, misuse, and tampering. Information (or data) and applications processed by ADPE must be protected from unauthorized or accidental modification, destruction, access, or disclosure. Whenever possible, personal computers should be located in rooms that can be locked when computers are unattended.

(2) Data is usually stored on a personal computer in one of two forms: "floppy" diskettes or hard disk. Diskettes containing sensitive unclassified information (see JAGR 380–5) should be removed and stored in a locked drawer or cabinet when not in use. If the hard disk contains sensitive unclassified information, the user division must develop specific procedures to ensure that physical access to the personal computer is limited. The Information Center will provide assistance to users in designing and developing such procedures. Classified material will NOT be processed on computer equipment that is not TEMPEST certified.

(3) To prevent accidental erasure or destruction of data, users should develop procedures to make backup copies of all stored data at least weekly. It is necessary to back up only those diskettes that were changed during the week. Backup diskettes or tapes should be stored in a locked drawer or cabinet in a different room from the personal computer. Users are responsible for maintaining at least one valid backup copy of all permanent data at all times. In the event of machine failure or other accidental destruction of data, users must restore their data from backup diskettes.

(4) Users are responsible for observing all copyrights and license 21 agreements for software products they use. Users who are unsure about copyrights on specific software products should contact the Information Center. Unauthorized reproduction of copyrighted software is a violation of the Copyright Act of 1976. The IMO will check periodically to insure that copyrights are being observed.

e. Maintaining Data Integrity. In order to maintain high quality data bases, users will implement controls to assure that unauthorized access, manipulation, input, or transfer do not impair the quality of OTJAG's data. These controls are especially important when retrieving data from mainframe to personal computer ("downloading") and when sending data from personal computer to mainframe ("uploading"). This policy applies to both types of data transfer.

6. AUTOMATION COORDINATOR RESPONSIBILITIES.

a. Automation coordinators will represent division/office chiefs in meetings or activities called by the IMO. The automation coordinator must understand OTJAG automation policies and

procedures and implement them within his or her activity. The coordinator may request assistance from the Information Center or the IMO in technical and procedural matters. Coordinators should keep division/office users informed on all applicable automation plans, policies, and procedures.

b. The Information Center will contact coordinators whenever it needs general information, or to inform division/offices about important new information. The automation coordinator should also assist users with personal computer problems and act as interface between the users and the Information Center.

c. Automation coordinators are members of the OTJAG Automation Users Group and represent their activities at all User Group meetings.

7. ADDITIONAL SUPPORT CONSIDERATIONS.

a. Data Administration.

(1) Because OTJAG's data is stored in a variety of computer data bases at various OTJAG locations, attention must be given to data administration and information systems planning. The IMO is responsible for determining how user personal computer applications fit into OTJAG information architecture and how applications relate to the OTJAG Information Systems Plan (ISP).

(2) The ISP is an essential part of OTJAG's long range plans. Its purpose is to provide a foundation for data management and a well defined framework for application software development.

(3) The data required for execution of OTJAG functions is viewed as a business resource. The data must be organized to satisfy the business information requirements in a manner that provides stability of data structures, minimum redundancy, and efficient processing. The framework of data storage and access, known as data architecture, should be determined by the requirements of the business, not by any particular data base management system or individual application system. Data base management and application systems should be viewed as mechanisms for the storage, manipulation, and delivery of data to aid in accomplishing the missions of the Judge Advocate General's Corps.

b. Training.

(1) The IMO will develop training courses for the standard personal computer hardware and software products. Automation coordinators will advise the IMO of training requirements for their activity.

(2) The Information Center will be responsible for course description, technical content of the course, course notebook, and instructor.

c. Furniture, Electrical, and Environmental Factors.

(1) An important factor in the success of a personal computer application is how well the equipment fits into the work environment.

(2) User division/offices are responsible for ensuring that the personal computer environment is conducive to productive work. Space, lighting, 21 furniture, temperature, and electricity are environmental factors which must be considered. The IMO can assist users in design of an environmentally and ergonomically correct computer layout.

d. Supplies. Requests for consumable supplies (diskettes, printer ribbons, print wheels, paper, CRT cleaning kits, etc.) should be sent to the General Services Branch. Requests for computer support items such as keyboard trays, polaroid filters, paper feeders, etc., should be sent through the IMO to the Generals Services Branch.

e. User Groups. Users in each division/office are encouraged to join user groups and participate in group activities related to personal computers and software applications.

f. Communications. The standard communication software for OTJAG is Enable and SmartcomII. Either can be used to communicate with other personal computers and mainframes such as MILPERCEN and OPTIMIS. Instructions for sending/receiving files using personal computers may be obtained from the Information Center.

g. Restrictions on Programming.

(1) Standard off-the-shelf software should be used to the maximum extent possible. Use of conventional programming language (e.g., COBOL, FORTRAN, BASIC, Pascal, C, assembly language, etc.) is discouraged. However, in applications where important functions cannot be performed using off-the-shelf software, programs can be written in BASIC language.

(2) Requests for programming should be directed to the IMO. Requested programming projects will be evaluated by the IMO and accomplished using such programming resources and programming languages as are appropriate.

h. Surplus Hardware and Software Products. Automation coordinators will inform the IMO when hardware or software products are no longer needed. The IMO will take action to redistribute or properly dispose of such surplus items. (DAJA–IM)

ENLISTED UPDATE

Sergeant Major Dwight Lanford

For many years the Legal Specialist Course staff, assigned to the Adjutant General School, U.S. Army Soldier Support Institute, Fort Benjamin Harrison, Indiana, has been producing quality legal specialists. These legal specialists fulfill the needs of commanders and staff judge advocates throughout the active Army and the Reserve Components.

Graduating legal specialists arrive at their new duty stations with the requisite *basic* skills to perform at battalion or brigade level with appropriate supervision. The key is the need for appropriate supervision. The new recruit spends ten weeks at the Legal Specialist Course receiving instruction in military correspondence, administrative eliminations, administration of nonjudicial punishment, pretrial document preparation, summarized record of trial preparation, and post trial document preparation. Automation classes have been scheduled, but the staff is waiting for the arrival of thirty-one Zenith 248 computers to implement the course material. Regardless of the instruction received, supervisors must recognize that the new graduate's skills are limited to a classroom environment. The new graduates will need additional training in the field to become first-class legal specialists.

The members of the Legal Specialist Course staff are continuously looking for better ways to serve the commanders and SJAs in the field. Suggestions and recommendations should be sent to the following address: Commandant, U.S. Army Soldier Support Institute, ATTN: ATSG–AGT–S–L (CW2 Burton or MSG Miller), Fort Benjamin Harrison, IN 46216–5530; or you may telephone Autovon 699–7865/7866, commercial (317) 543–7865/7866. Even though we

may identify areas or subjects that should be taught, it is a complicated procedure to make a new subject part of the Program of Instruction. Everything taught at the school must be part of the MOS Training Plan (MTP) and can be found in Chapter Two of the Soldier's Manual. Changing the MTP takes time, as does development of course material. Therefore, a good suggestion may take a year to implement and making that task a requirement for SQT may take longer. We will be persistent in our desire and actions to change course materials in reflecting the needs of the Army, however.

If you are interested in becoming an instructor at the Legal Specialist Course, you should send a letter requesting consideration for assignment, accompanied by a copy of your DA Forms 2A and 2–1 and a Letter of Recommendation from your Chief Legal NCO/Staff Judge Advocate, to *DA, USTAPA, ATTN: 71D/E Branch, DAPC–EPM–A, 2461 Eisenhower Avenue, Alexandria, VA 22331–0400.*

The Legal Basic Noncommissioned Officers Course (BNCOC) is increasing from two to four iterations this year. The course is five weeks long and is geared for training soldiers in Skill Level 3 (Staff Sergeants and Sergeants (P)). Students are selected by Department of the Army.

The legal research class for BNCOC still is in need of law books. In particular, the library is short of *United States Code Annotated,* the indexes for *Court-Martial Reports* and *Military Justice Reporter.* We could also use a set of the *Federal Reporter* or *Federal Supplement.* Miscellaneous books like *Black's Law Dictionary* are always a welcome addition. If you have extra books, please notify the Army Law Library Service, so it can arrange a transfer. The address is The Judge Advocate General's School, ATTN: JAGS–DDS, Charlottesville, VA 22903–1781.

The 71D and 71E Soldier's Manuals, dated February 1988, will be used to train and study for the FY 88 71D and 71E SQTs. Ensure your soldiers and trainers have access to the current publications. Soldier's Manuals are guides for training and evaluating soldiers as they perform the critical tasks of their MOS's. When new doctrine is published that invalidates portions of the Soldier's Manual, the new doctrine should be used for training and evaluation in place of those portions of the manual that have become obsolete. The SQTs for MOS 71D and 71E will be based on the latest doctrine available three and one-half months prior to the opening of the test window.

Skill Qualification Testing has been completed for Fiscal Year 87. The mean scores for the Active Component are below. SQT window for the Reserve Component closed 31 Jan 88 and the mean scores that have been reported are below. We do not yet have results for the reserve MOS 71E. The numbers inside brackets ( ) are the number of soldiers reported by the MILPOs.

Out of the 1501 active duty MOS 71Ds tested, 103 failed (scored below 60), but 25 made a maximum score. Under MOS 71E (active duty), all Skill Level 2s passed, 97.2% of Skill Level 3s passed and 92.6% of Skill Level 4s passed.

The test windows for the FY 88 71D/E SQTs for Active Army are 1 Aug 88–31 Oct 88; and 1 Aug 88–31 Jan 89 for Reserve Components. New procedures for setting SQT passing scores became effective with the FY 87 test. This procedure, known as the Minimum Passing Score (MPS), was designed by TRADOC to ensure that a passing score on one SQT had essentially the same meaning as a passing score on a different SQT. The MPS will be obtained for each skill level from soldier validation data of tasks contained in the SQT. This tentative data will be reviewed and may be adjusted based on historical SQT scores of previous years. The score a solider will receive on his or her Individual Soldier's Report (ISR) will factor in the MPS.

	71D							71E			
	ACTIVE			RESERVE				ACTIVE			
SKILL LEVEL	FY 87		FY 86	FY 87		FY 86		FY 87		FY 86	
1	78%	(697)	73% (504)	64%		56%					
2	82%	(395)	79% (491)	47%		58%		86%	(29)	86%	(28)
3	82%	(157)	82% (226)	43%		60%		87%	(36)	94%	(33)
4	84%	(252)	87% (185)	62%		64%		84%	(27)	91%	(26)
AVG	82%	(1501)	80% (1406)	54%	(58)	60%	(410)	86%	(92)	90%	(87)

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Colonel Ritchie to Become Assistant Judge Advocate General for Operations, IMA

Colonel James E. Ritchie, staff judge advocate of the 310th TAACOM, has been selected for the position of Assistant Judge Advocate General for Operations, IMA. Colonel Ritchie will occupy the position previously held by Brigadier General Robert Tips. Colonel Ritchie has over 26 years of commissioned service. He is a senior partner of the law firm, James E. Ritchie and Associates, located in Washington, D.C. The firm specializes in taxation and tourism issues. He completed a B.S. degree in business at Oklahoma State University in 1958, and a J.D.S. degree in law at the University of Tulsa in 1961. His military education includes the Army War College; Civil Affairs Officer Advanced Course; JAGC Reserve Component General Staff Course;

JA Officer Advance Correspondence Course; Military Judge Course; resident JAGC Officer Basic Course, and the resident Armor Officer Basic Course.

Colonel Ritchie started his career in France, after his basic courses, as an assistant staff judge advocate in a military justice branch. He left the active force in 1965 and went into an USAR Control Group. In 1967 he became a MOBDES (now called IMA) to the US Army Judiciary in Washington, D.C. In 1980 he became the Staff Judge Advocate of the 352d Civil Affairs Command in Riverdale, Maryland. From 1985-1986 he served as Staff Judge Advocate (IMA) to Headquarters, USCENTCOM. His current assignment is as Staff Judge Advocate, 310th TAACOM, located at Fort Belvoir, Virginia.

Among his awards, decorations, and badges are the Defense Meritorious Service Medal; Meritorious Service Medal; Army Commendation Award; Army Achievement Medal; National Defense Service Medal; Armed Forces Reserve Medal; Army Reserve Components Achievement Medal; Army Service Award; Overseas Service Ribbon; Army Basic Parachutist Badge, and the Egyptian Parachutist Badge.

He is married to the former Patricia Jane Geis of Cherokee, Oklahoma. He has two sons, Ian Machintosh Ritchie (16) and Alexander Machintosh Ritchie (5), and a daughter Shana Patrice (9).

FICA Tax Now Imposed On Reservists Performing Inactive Duty Training

Prior to 1987, military personnel did not receive social security credit and were not liable for Federal Insurance Compensation Act (FICA) taxes on earnings from "inactive duty from training" I.R.C. § 3121(i) (West Supp. 1987). As a result of legislation passed in 1987, inactive duty for training by members of the armed forces is now treated as "covered employment" for FICA and Social Security purposes 42 U.S.C. § 410(1)(1), *as amended by* § 9001(a)(1) of the Omnibus Budget Reconciliation Act of 1987, P.L. 100–203, __Stat.__ (1987). Compensation earned from inactive duty training, including weekend training drill sessions, will be considered wages for Social Security and FICA tax purposes. The new legislation is effective for all compensation earned by Reservists for inactive duty military training after 31 December 1987. MAJ Ingold.

Digest of Opinion of The Judge Advocate General

DAJA–CL 1988/5027 (27–1a), 11 February 1988, Reduction Authority of Commanders under Article 15, UCMJ.

The Judge Advocate General was asked why an Active Guard and Reserve (AGR) Staff Sergeant (E–6) cannot be reduced in rank by nonjudicial punishment and an active component Staff Sergeant may be reduced. AR 140–158, Army Reserve—Enlisted Personnel Classification, Promotion and Reduction, paragraph 4–37, limits the reduction authority under nonjudicial punishment for AGR to soldiers E–5 and below while an active component soldier in the grade of E–6 may be reduced under Article 15, U.C.M.J. (AR 600–200, Personnel General—Enlisted Personnel Management System, paragraph 6–3).

The answer lies in Article 15 and the promotion authority for AGR and active component soldiers. Article 15(b)(2)(D) states that punishment may include "reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction. . . ." Active component soldiers are promoted to grade E–6 by decentralized promotion boards and hence may be reduced by local commanders. The promotion to grades E–7 and higher is at Department of the Army level; therefore, commanders may not reduce active component soldiers in these grades. For AGR soldiers, centralized promotion at Department of the Army level is made for grade E–6. AGR soldiers of this rank and higher may not be reduced by the local commander.

The Joint Service Committee has studied, and rejected, a proposal to amend Article 15 to permit General Officers in command to reduce senior non-commissioned officers (DAJA–CL 1985/6342).

There is no similar restriction on the reduction authority of Courts-Martial. A Summary Court-Martial may reduce a senior non-commissioned officer one grade. R.C.M. 1301(d)(2).

This opinion should be publicized to Active and Reserve Component Commanders. Reserve Component Commanders may begin to exercise authority under Article 15 on 1 July 1988 unless withheld by superior authority.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP–OPS–JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903–1781 (Telephone: AUTOVON 274–7110, extension 972–6307; commercial phone: (804) 972–6307).

2. TJAGSA CLE Course Schedule

May 2–13: 115th Contract Attorneys Course (5F–F10).

May 16–20: 33rd Federal Labor Relations Course (5F–F22).

May 23–27: 1st Advanced Installation Contracting Course (5F–F18).

May 23–June 10: 31st Military Judge Course (5F–F33).

June 6–10: 94th Senior Officers Legal Orientation Course (5F–F1).

June 13–24: JATT Team Training.

June 13–24: JAOAC (Phase VI).

June 27–July 1: U.S. Army Claims Service Training Seminar.

July 11–15: 39th Law of War Workshop (5F–F42).

July 11–13: Professional Recruiting Training Seminar.

July 12–15: Chief Legal NCO/Senior Court Reporter Management Course (512–71D/71E/40/50).

July 18–29: 116th Contract Attorneys Course (5F–F10).

July 18–22: ~~17th Law Office Management Course (7A–713A)~~ CANCELLED

July 25–September 30: 116th Basic Course (5–27–C20).

August 1–5: 95th Senior Officers Legal Orientation Course (5F–F1).

August 1–May 20, 1989: 37th Graduate Course (5–27–C22).

August 15–19: 12th Criminal Law New Developments Course (5F–F35).

September 12–16: 6th Contract Claims, Litigation, and Remedies Course (5F–F13).

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines, every three years beginning in 1989
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually or 1 year after admission to Bar beginning in 1988
North Carolina	12 hours annually beginning in 1988
North Dakota	1 February in three-year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the January 1988 issue of The Army Lawyer.

4. Army Sponsored Continuing Legal Education Calendar (1 April 1988–31 December 1988)

The following is a schedule of Army Sponsored Continuing Legal Education, not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697–3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972–6380; Trial Judiciary, (703) 756–1795; Trial Counsel Assistance Program (TCAP), (202) 756–1804; U.S. Army Trial Defense Service (TDS), (202) 756–1390; U.S. Army Claims Service, (301) 677–7804; Office of the Judge Advocate, U.S. Army Europe, & Seventh Army (POC: MAJ Butler, Heidelberg Military 8930). This schedule will be updated in *The Army Lawyer* on a periodic basis. Coordinator: MAJ Williams, TJAGSA, (804) 972–6342.

TRAINING	LOCATION	DATE
USAREUR German/ American Law Symposium	TBA (German Hosted)	5–6 April 1988
Western Regional Claims Workshop	San Antonio, TX	5–7 April 1988
TJAGSA On-site	Miami, FL	9–10 April 1988
USAREUR Legal Administrator's Workshop	Heidelberg, Germany	11–12 April 1988
TCAP Seminar	San Diego, CA	12–13 April 1988
TJAGSA On-site	San Juan, PR	16–17 April 1988
TJAGSA On-site	Oxford, MS	16–17 April 1988
TJAGSA On-site	New Orleans, LA	16–17 April 1988
USAREUR Judge Advocate Training Seminar for SJAs	Heidelberg, Germany	21–22 April 1988
TJAGSA On-site	Chicago, IL	23–24 April 1988
TDS Workshop (Region VI)	Yongsan, Korea	April 1988
USAREUR Claims Regional Training	Kaiserslautern, Germany	April 1988

Eastern Regional Claims Workshop	Raleigh, NC	10–12 May 1988
TJAGSA On-site	Columbus, OH	14–15 May 1988
TJAGSA On-site	Park City, UT	14–15 May 1988
TCAP Seminar	Frankfurt, Germany	16–17 May 1988
USAREUR Operational Law Workshop	Heidelberg, Germany	17–20 May 1988
TDS Workshop (Region II)	Fort Stewart, GA	18–20 May 1988
TCAP Seminars	Nuernberg, Germany Stuttgart, Germany	19–20 May 1988 23–24 May 1988
TDS Workshop (Region V)	Fort Lewis, WA	24–26 May 1988
TCAP Seminar	Kaiserslautern, Germany	26–27 May 1988
TDS Workshop (Region I)	Fort Knox, KY	May 1988
USAREUR Trial Observer's Workshop	TBA	May 1988
5th Judicial Circuit Training Seminar	Wurzburg, Germany	3 June 1988
TCAP Seminar	Fort Hood, TX	14–15 June 1988
TDS Workshop (Region IV)	Austin, TX	June 1988
TCAP Seminar	Fort Monroe, VA	19–20 July 1988
TCAP Seminar	Atlanta, GA	2–3 Aug 1988
USAREUR OIC/CJA Orientation	Heidelberg, Germany	5 Aug 1988
USAREUR SJA Training Seminar	Heidelberg, Germany	18–19 Aug 1988
TDS Workshop (Europe)	Europe	August 1988
Tri-Service Judges Conference	Garmisch, Germany	11–16 Sept 1988
TCAP Seminar	Kansas City, MO	13–14 Sept 1988
TDS Workshop (Region VI)	Yongsan, Korea	September 1988
USAREUR NAF Training Seminar	Heidelberg, Germany	September 1988
USAREUR Criminal Law Workshops and Advocacy Course	Garmisch, Germany	9–13 Oct 1988 14–17 Oct 1988 (Trial Advocacy) 17–21 Oct 1988
TDS (Region III)	Fort Leavenworth, KS	October 1988
USAREUR Claims Regional Seminar	TBA	October 1988
TJAGSA On-Site	Minneapolis, MN	October 1988
USAREUR International Law Orientation	Heidelberg, Germany	October 1988
TJAGSA On-Site	St. Louis, MO	October 1988
USAREUR Magistrates Training Seminar	Mannheim, Germany	October 1988
TJAGSA On-Site	Boston, MA	October 1988
TDS Workshop (Region II)	Fort Benning, GA	2–4 Nov 1988
Judge Advocates Management Seminar	Berchtesgaden, Germany	21–23 Nov 1988
TCAP Seminar	Hawaii	November 1988
TJAGSA On-Site	Philadelphia, PA	November 1988
TJAGSA On-Site	Detroit, MI	November 1988
TJAGSA On-Site	Indianapolis, IN	November 1988
TDS Workshop (Region I)	Fort Dix, NJ	November 1988
USAREUR International Law Training Seminar	TBA	November 1988
USAREUR 5th Judicial Circuit Training Seminar	TBA	November 1988
TDS Workshop (Region V)	Presidio, S.F.	6–8 Dec 1988
TCAP Seminar	San Antonio, TX	December 1988
TJAGSA On-Site	New York, NY	December 1988

5. Civilian Sponsored CLE Courses

June 1988

2: PLI, Creative Real Estate Financing Techniques (Satellite), USA cities.

2: ABA, Marketing Legal Services (Satellite), USA cities.

2–3: PLI, Antitrust Law Institute, New York, NY.

2–3: PLI, Developing Export Trade, Los Angeles, CA.

2–3: PLI, Securities Enforcement Institute, New York, NY.

2–3: BNA, Environment and Safety, Washington, D.C.

2–4: ALIABA, Commercial Real Estate Leasing, Chicago, IL.

2–10: NCDA, Executive Prosecutor Course, Houston, TX.

3: NKU, State and Federal Grand Jury Practice, Highland Hts., KY.

4–5: MLI, Psychological Disorders, Evaluation and Disability, Las Vegas, NV.

6–7: PLI, Construction Contracts and Litigation, San Francisco, CA.

6–7: PLI, Hazardous Waste Litigation, Chicago, IL.

7: PLI, Creative Real Estate Financing Techniques (Satellite), USA cities.

9: ALIABA, Pension Law and Practice II (Satellite), USA cities.

9–10: PLI, Retail Financial Services, New York, NY.

9–10: BNA, EEO, Washington, D.C.

13: BNA, Smoking, Washington, D.C.

15: PBI, Administration of Estates, Kittanning, PA.

16–17: PLI, Hazardous Waste Litigation, New York, NY.

16–17: PLI, Institute on Employment Law, New York, NY.

16–7/1: NCDA, Career Prosecutor Course, Houston, TX.

17: PBI, Driving under the Influence, Altoona, PA.

19–24: NJC, Sentencing Misdemeanants, Reno, NV.

20–21: PLI, Libel Litigation, New York, NY.

20–21: PLI, Retail Financial Services, Chicago, IL.

20–24: ALIABA, Estate Planning in Depth, Madison, WI.

20–24: ALIABA, Postmortem Planning and Estate Administration, Boulder, CO.

20–24: ALIABA, Environmental Litigation, Boulder, CO.

23–24: PLI, Antitrust Law Institute, Chicago, IL.

24: NKU, Law Office Management, Highland Hts., KY.

24: PBI, Civil Litigation Update, Mercer, PA.

24–25: UKCL, Real Estate Law and Practice, Lexington, KY.

24–26: MLI, Orthopedic Injury and Disability, Boston, MA.

26–30: AAJE, Constitutional Criminal Procedure, Lexington, VA.

26–7/1: NITA, Advanced Trial Advocacy Program, Boulder, CO.

29: PBI, Driving under the Influence, Kittanning, PA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1988 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1–100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314–6145, telephone (202) 274–7633, AUTOVON 284–7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B112101	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–87–1 (302 pgs).
AD B112163	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–87–2 (214 pgs).
AD B100234	Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211	Contract Law Seminar Problems/JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).

AD B116100 Legal Assistance Consumer Law Guide/ JAGS–ADA–87–13 (614 pgs).

AD B116101 Legal Assistance Wills Guide/JAGS–ADA–87–12 (339 pgs).

AD B116102 Legal Assistance Office Administration Guide/JAGS–ADA–87–11 (249 pps).

AD B116097 Legal Assistance Real Property Guide/ JAGS–ADA–87–14 (414 pgs).

AD A174549 All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).

AD B089092 All States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).

AD B093771 All States Law Summary, Vol I/JAGS–ADA–87–5 (467 pgs).

AD B094235 All States Law Summary, Vol II/JAGS–ADA–87–6 (417 pgs).

AD B114054 All States Law Summary, Vol III/JAGS–ADA–87–7 (450 pgs).

AD B090988 Legal Assistance Deskbook, Vol I/JAGS–ADA–85–3 (760 pgs).

AD B090989 Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).

AD B092128 USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).

AD B095857 Proactive Law Materials/JAGS–ADA–85–9 (226 pgs).

AD B116103 Legal Assistance Preventive Law Series/ JAGS–ADA–87–10 (205 pgs).

AD B116099 Legal Assistance Tax Information Series/ JAGS–ADA–87–9 (121 pgs).

Claims

AD B108054 Claims Programmed Text/JAGS–ADA–87–2 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS–ADA–84–5 (176 pgs).

AD B087849 AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).

AD B087848 Military Aid to Law Enforcement/JAGS–ADA–81–7 (76 pgs).

AD B100235 Government Information Practices/ JAGS–ADA–86–2 (345 pgs).

AD B100251 Law of Military Installations/JAGS–ADA–86–1 (298 pgs).

AD B108016 Defensive Federal Litigation/JAGS–ADA–87–1 (377 pgs).

AD B107990 Reports of Survey and Line of Duty Determination/JAGS–ADA–87–3 (110 pgs).

AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS–ADA–86–9 (146 pgs).

Labor Law

AD B087845 Law of Federal Employment/JAGS–ADA–84–11 (339 pgs).

AD B087846 Law of Federal Labor-Management Relations/JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/JAGS–DD–84–1 (55 pgs).

AD B088204 Uniform System of Military Citation/ JAGS–DD–84–2 (38 pgs.)

Criminal Law

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).

AD B100212 Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 10–73	Organization and Functions JAG School U.S. Army	101	29 Feb 88
AR 50–4	Safety Studies and Reviews of Nuclear Weapon Systems		20 Jan 88
AR 190–30	Military Police Investigations	101	17 Jan 88
AR 351–3	Professional Education and Training Programs of the Army Medical Department		8 Feb 88
AR 381–19	Intelligence Dissemination and Production Support		16 Feb 88
AR 600–8–2	Suspension of Favorable Personnel Actions (FLAGS)	101	11 Jan 88
AR 600–50	Standards of Conduct for Department of the Army Personnel		28 Jan 88
AR 710–1	Centralized Inventory Management of Army Supply System		1 Feb 88
CIR 11–87–6	Internal Control Review Checklists		28 Dec 87
CIR 11–88–2	Policies for the Sinai Multinational Force and Observers		1 Feb 88
DA Pam 25–30	Index of Army Pubs		31 Dec 87
DA Pam 40–17	Veterinary Activities (RCS MED–25(R6))		5 Feb 88
DA Pam 672–3	Unit Citation Campaign Participation Credit Register		29 Jan 88
DA Pam 700–55	Instructions for Preparing the Integrated Logistic Support Plan		1 Mar 88
UPDATE 12	Message Address Directory		31 Jan 88
UPDATE 20	Reserve Components Personnel		27 Feb 88

3. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 Mich. L. Rev. 1741 (1987).

Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts"*, 56 U. Cin. L. Rev. 779 (1988).

Fowler, *A New Obstacle to Income Shifting: The Kiddie Tax*, 66 Taxes 115 (1988).

Goedhuis, *Some Observations on the Attitude of West-European Governments to the Development of Defensive Weapons in Outer Space*, 15 J. Space L. 101 (1987).

Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919 (1988).

Hirsch, *Use Immunity for Criminal Defendants?*, 20 Conn. L. Rev. 95 (1987).

Kauffman, *Electronic Databases in Legal Research: Beyond LEXIS and WESTLAW*, 13 Rutgers Computer & Tech. L.J. 73 (1987), *reprinted in* 37 Def. L.J. 223 (1988).

Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. Cin. L. Rev. 845 (1988).

Maveety, *The Populist of the Adversary Society: The Jursiprudence of Justice Rehnquist*, 13 J. Contemp. L. 221 (1987).

Perlin, *The Supreme Court and the Mentally Disabled Criminal Defendant: Recent Developments*, 15 Bull. Am. Acad. Psychiatry & L. 391 (1987).

Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. Miami L. Rev. 447 (1987).

Rose & O'Neil, *The Impact of the Tax Reform Act of 1986 on Rents and Property Values*, 15 J. Real Est. Tax'n 145 (1988).

Schworer, *Problems Arising from the Creation of a Computer-Based Litigation Support System*, 14 N. Ky. L. Rev. 263 (1987).

Symposium on Eyewitness Identification Testimony, 8 U. Bridgeport L. Rev. 1 (1987).

Verbofskyu, *Parents of Disabled Children Benefit From Lang Case*, Tr. & Est., Dec. 1987, at 16.

Wallin, *The Uncertain Scope of the Plain View Doctrine*, 16 U. Balt. L. Rev. 266 (1987).

Comment, U.S. v. Inadi: *Confrontation Rights and Co-Conspirator's Statements, or How Car Trouble Put the Sixth Amendment in the Breakdown Lane*, 22 New Eng. L. Rev. 341 (1987).

Note, *Client Perjury and the Constitutional Rights of the Criminal Defendant*, 52 Mo. L. Rev. 485 (1987).

Note, *The Drug-Free Federal Workplace: A Question of Reasonableness*, 29 Wm. & Mary L. Rev. 215 (1987).

Note, *United States Strategic Mineral Policy*, 21 Loy. L.A.L. Rev. 107 (1987).

Note, *The Use of Force in Combatting Terrorism*, 25 Colum. J. Transnat'l L. 377 (1987).

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By Order of the Secretary of the Army:

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